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United States
Circuit Court of Appeals

For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION, a Corporation, THE
ARIZONA TRUST COMPANY, a Corpora-
tion, and SIMS ELY, as Receiver of The Ari-
zona Mutual Savings and Loan Association
and as Receiver of The Arizona Trust Com-
pany,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District
of Arizona.

Filed

DEC 20 1915

F. D. Monckton,
Clerk.

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Bill in Equity.]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—E-25.

ARTHUR A. KLINE,

Complainant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation; THE ARI-
ZONA TRUST COMPANY, a Corporation;
and SIMS ELY, as Receiver of THE ARI-
ZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, and as Receiver of THE
ARIZONA TRUST COMPANY,

Defendants.

To the Honorable Judge of the United States Dis-
trict Court for the District of the State of Ari-
zona:

Arthur A. Kline, a citizen of the State of Texas,
residing in the City of El Paso, El Paso County, in
said State, brings this his bill against The Arizona
Mutual Savings and Loan Association, a corpora-
tion duly organized and existing under the laws of
the State of Arizona, and having its principal place
of business at the City of Phoenix, in Maricopa
County in said State and a citizen of said State and
District of Arizona; The Arizona Trust Company,
a corporation, duly organized and existing under the
laws of the State of Arizona, and having its prin-
cipal place of business at the City of Phoenix, in

Maricopa County, State of Arizona, and a citizen of said County and State and District of Arizona; and Sims Ely, as Receiver of the Arizona Mutual Savings and Loan Association, and as receiver of The Arizona Trust Company, a citizen of the State of Arizona, residing at the City of Phoenix, in Maricopa County, in said State and District, leave to sue said receiver having been first had and obtained under order of [2*] this Court made and entered in equity cause Numbered 53 in this court on the 1st day of July, 1914;

And, therefore, the complainant herein, Arthur A. Kline, complains of said defendants and each of them and says:

I.

That said complainant, Arthur A. Kline, is a citizen of the State of Texas, residing at the City of El Paso, County of El Paso, in said State of Texas, and that the defendant, Sims Ely, as receiver of The Arizona Mutual Savings and Loan Association, and as receiver of The Arizona Trust Company, is a citizen of the State of Arizona, residing at the City of Phoenix, Maricopa County, in the State and District of Arizona, and is now the duly appointed, qualified and acting receiver of the Arizona Mutual Savings and Loan Association and the Arizona Trust Company in that cause now pending in the above-named court upon the equity side thereof, entitled Charles W. Clark versus The Arizona Mutual Savings and Loan Association and the Arizona Trust Company, which cause is known upon the dockets

*Page-number appearing at foot of page of original certified Record.

thereof as equity suit Number 53, and that said defendants herein, The Arizona Mutual Savings and Loan Association and The Arizona Trust Company, are, and each of them is a corporation, duly organized and existing under the laws of the State of Arizona, with their respective places of business at the City of Phoenix, Maricopa County, State of Arizona, and respectively citizens and residents of said State and District of Arizona.

That the matter in controversy, or the matter in dispute, between the complainant herein and said defendants, exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That heretofore, to wit, on the 2d day of March, 1912, the defendant, The Arizona Trust Company, for value, made, executed [3] and delivered to the complainant herein its certain promissory note wherein and whereby it promised to pay to the order of the complainant, on or before July 1st, 1912, at The Valley Bank of Phoenix, at Phoenix, Arizona, the sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00), with interest thereon at the rate of Eight (8%) per cent per annum, payable at maturity, from date until paid, and the additional sum of five (5%) per cent as attorney's fees on the amount found due in the event suit was brought on said note.

That in order to secure the payment of said note when the same became due, the said defendant, The Arizona Trust Company, at the same time endorsed in blank and delivered to said Valley Bank in pledge

for the use of said complainant certain negotiable notes secured by mortgage on real estate in Arizona as follows:

No.				
119	E. E. Wallen,	Bisbee,	\$1,500.00	\$1,500.00
246	E. W. Booker,	Globe,	500.00	500.00
250	E. E. Smith, et al.,	Wickenburg,	339.25	400.00
253	O. W. Jennings, et al.	"	688.00	800.00
258	Thos P. Alger,	Safford,	564.00	600.00
261	Phoenix Construction Co.,	Phoenix,	1,982.00	2,000.00
			<u>\$5,573.25</u>	<u>\$5,800.00</u>

That each and all of said notes and mortgages so delivered as aforesaid to the Valley Bank of Phoenix, were, by agreement of the complainant and said defendant, The Arizona Trust Company, delivered as collateral security for the payment of said principal note of the said defendant, The Arizona Trust Company, in the sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00), together with interest thereon and attorney's fees as aforesaid.

That the complainant herein is now and has been at all times since the execution and delivery of said principal note the owner and holder thereof, and that said note is now wholly unpaid, except the sum of Two Hundred Dollars (\$200.00) interest paid thereon August 17th, 1912, and that there is now due and owing from said defendant, The Arizona Trust Company, to this complainant, the sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00), with interest thereon at the rate of Eight (8%) per cent per [4] annum from the 17th day of August, 1912, together with five (5%)

per cent additional on the amount found due on said note as attorney's fees.

That no part of said principal note of the said defendant, The Arizona Trust Company, was paid when due, and pursuant to the terms of the agreement of said complainant and the said defendant, The Arizona Trust Company, made at the time of the delivery of said collateral security to said Valley Bank, the said Valley Bank, on or about the 17th day of September, 1912, delivered to the complainant herein all of the said collateral notes, together with the mortgages securing the same, and this complainant now holds said collateral as security for the payment of said principal note given him by the said defendant, The Arizona Trust Company.

That after the maturity of said principal note said complainant made demand of said defendant, The Arizona Trust Company, for the payment of said principal note, but that said defendant Trust Company failed and refused to pay said note, and there is now due and owing to this complainant on said principal note the sum of Five Thousand Five Hundred and Thirty-two Dollars(\$5,532.00), with interest thereon at the rate of eight (8%) per cent per annum from the 17th day of August, 1912, together with five (5%) per cent additional on the amount found due on said note as attorney's fees.

Complainant further says that long after said transactions where had by him with the said defendant, The Arizona Trust Company, and long after the said collateral security was delivered as aforesaid to the said Valley Bank, for the use and benefit of

the complainant herein, upon a bill of complaint filed in this court by one Charles W. Clark against the defendant, The Arizona Mutual Savings and Loan Association and The Arizona Trust Company, which action is now pending in said court, and known upon the dockets thereof as equity suit Number 53, the said defendant, Sims Ely, was, by said Court, duly appointed receiver of the [5] assets of said defendants, The Arizona Mutual Savings and Loan Association and The Arizona Trust Company, and that said defendant, Sims Ely, is now the duly appointed, qualified and acting receiver in said pending equity suit, and as such receiver is now, and has been since his appointment therein, making claim to the right of possession and control of said collateral security as part of the assets of The Arizona Mutual Savings and Loan Association.

That the complainant herein prior to the institution of this suit offered to surrender to said defendant receiver the said collateral upon payment to him by said receiver of the said principal sum with interest due upon said principal note as aforesaid, but that said receiver has refused and does now refuse to pay the amount due upon said principal note as aforesaid.

That heretofore, to wit; on the 29th day of June, 1914, this complainant filed in said equity suit Number 53 now pending in said court, his verified written motion praying therein for leave to commence and prosecute in said court an independent suit against said receiver, on said principal note and to foreclose his lien on said collateral security now held by him,

and that thereafter, to wit; on the 1st day of July, 1914, upon a hearing on said motion, said Court made and caused to be entered in said equity suit No. 53, an order authorizing and granting leave to this complainant to commence and prosecute against said receiver an independent suit in said court on said principal note and to foreclose his lien on said collateral security now held by him.

This complainant further alleges upon information and belief, that the Arizona Mutual Savings and Loan Association, one of the defendants herein, claims some right, title and interest in and to the aforesaid collateral the extent and nature of which claim is to this complainant unknown.

IN CONSIDERATION WHEREOF, And inasmuch as your complainant has no adequate remedy at law, he therefore prays the aid of this Court:
[6]

1. That the said defendant may be required to make answer respectively to all and singular the matters hereinbefore stated, but not under oath, answer under oath being hereby expressly waived.

2. That upon the final hearing of this cause it be ordered and decreed that the defendants, The Arizona Trust Company and Sims Ely, as receiver of the Arizona Trust Company, do pay to the complainant the sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00), together with interest thereon at the rate of eight (8%) per cent per annum from the 17th day of August, 1912, and the additional sum of (5%) per cent on the amount found due on said note as attorney's fees, and costs.

3. That is be further ordered and decreed that the lien of the complainant upon the said collateral security for the several amounts aforesaid be declared to be a valid lien upon all of such property.

4. That unless the said receiver shall pay within a short time to be fixed by this Court, into this court, for the benefit of this complainant the said sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00), together with interest thereon at the rate eight per cent per annum from the 17th day of August, 1912, and the further sum of five per cent on the amount found to be due as aforesaid as attorney's fees, together with the costs and expenses in this suit incurred, then, that the said defendants and all of them and all persons claiming under or through them or either of them, may be forever barred and foreclosed of and from any equity of redemption of and all claim or interest in the said collateral security aforesaid, and that all and singular the said collateral security mortgaged and pledged to your complainant or held by him subject to lien may be sold in one parcel and as an entirety under a decree of this Honorable [7] Court and that this complainant be permitted to become a purchaser of said property at such sale and that in case of the insufficiency of the proceeds of said sale to pay in full the amount of the principal and interest, attorney's fees, costs and accruing costs, that a judgment may be rendered in this cause for such deficiency against the defendant, The Arizona Trust Company, and that the complainant be permitted to file said judgment for such deficiency

as a general creditor of The Arizona Trust Company in said equity cause No. 53 aforesaid.

5. That your complainant may have such other and further relief in the premises as may be just and equitable and as to your Honor shall seem just.

To the end that complainant may obtain the result prayed for herein, may it please your Honor to grant to your complainant a writ or writs of subpoena to be directed to the said defendants, The Arizona Mutual Savings and Loan Association and The Arizona Trust Company, Sims Ely, as receiver of The Arizona Mutual Savings and Loan Association, and Sims Ely as receiver of The Arizona Trust Company, therein and thereby commanding them and each of them that within a certain time and under a certain penalty therein to be named, to be and appear before your Honor in this honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to abide and perform such other and further orders or *decrees* to your Honor may seem meet.

ARTHUR A. KLINE,
Complainant.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. L. MORGAN,

Solicitors for Complainant, Whose Respective Addresses are 312-315 National Bank of Arizona Building, Phoenix, Arizona. [8]

State of Texas,

County of El Paso,—ss.

Arthur A. Kline, being first duly sworn upon his oath, deposes and says, that he is the complainant in the above-entitled cause, and affiant says that he has read the foregoing Bill of Complaint and knows the contents thereof; that the statements and allegations therein contained are true of his own knowledge, except as to matters therein alleged and stated upon information and belief, and as to those matters he believes it to be true.

ARTHUR A. KLINE,
Affiant and Complainant.

Subscribed and sworn to before me this the 6th day of July, A. D. 1914.

[Seal]

D. L. HILL,
Notary Public.

My commission expires May 31st, 1915.

[Endorsements]: In Equity, No. E-25. In the District Court of the United States for the District of Arizona. Arthur A. Kline, Complainant, vs. The Arizona Mutual Savings and Loan Association, a Corporation, The Arizona Trust Company, a Corporation, and Sims Ely, as Receiver of The Arizona Mutual Savings and Loan Association, and as Receiver of The Arizona Trust Company, Defendants. Bill of Complaint. Filed Jul. 13, 1914, at 11 A. M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Thomas Armstrong, Jr., Ernest W. Lewis, R. L. Morgan, 314 National Bank of Arizona Bldg., Phoenix, Arizona, Solicitors for Complainant. [9]

[Subpoena Ad Respondendum.]

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Arizona.*

IN EQUITY.

The President of the United States, Greeting: To
The Arizona Mutual Savings and Loan Association,
a Corporation, The Arizona Trust Company, a Corporation;
and Sims Ely, as Receiver of the Arizona Mutual Savings
and Loan Association, and as Receiver of The Arizona Trust
Company, Phoenix, Arizona.

YOU ARE HEREBY COMMANDED, That you
be and appear in said District Court of the United
States, District of Arizona, at the courtroom in
Phoenix, Arizona, twenty days from the date hereof,
to answer a Bill of Complaint exhibited against you
in said court by Arthur A. Kline, who is a citizen of
the City of El Paso, Texas, and to do and receive
what the said Court shall have considered in that be-
half.

WITNESS the Honorable WILLIAM H. SAW-
TELLE, Judge of said District Court, this 13th day
of July, in the year of our Lord one thousand nine
hundred and fourteen, and of our Independence the
139th.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the clerk's office of said court, pursuant to said Bill: otherwise the said Bill may be taken *pro confesso*.

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk. [10]

[Endorsed:] No. E—25. U. S. District Court, District of Arizona. In Equity. Arthur A. Kline, vs. The Arizona Mutual Savings & Loan Association, et al., Defts. Subpoena. Ad Respondendum. Filed Jul. 14, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

United States Marshal's Return.

Received this writ at Phoenix, Ariz., July 13, 1914, and executed the same July 13, 1914, at Phoenix, Arizona, as follows:

By delivering to and leaving with John T. Dunlap, Statutory Agent of the Arizona Mutual Savings and Loan Association, personally, a certified copy of this writ, together with a copy of the bill of complaint herein filed.

By delivering to and leaving with Lysander Cassity, Statutory Agent of the Arizona Trust Co., personally, a certified copy of this writ, together with a copy of the bill of complaint filed herein.

By delivering to and leaving with Sims Ely, as Receiver of the Arizona Mutual Savings & Loan Association, and to Sims Ely as Receiver of the Arizona Trust Co. personally, a certified copy of this writ, together with a copy of the bill of complaint filed herein.

Returned this 13th day of July, 1914.

J. P. DILLON,
U. S. Marshal,
By Chas. R. Price,
Deputy.

Marshal's fees for service, \$12.00.

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—E-25.

ARTHUR A. KLINE,

Complainant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation; THE ARI-
ZONA TRUST COMPANY, a Corporation;
and SIMS ELY, as Receiver of THE ARI-
ZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, and as Receiver of THE
ARIZONA TRUST COMPANY,

Defendants.

Answer.

To the Honorable Judge of the United States District Court for the District of the State of Arizona:

The answer of Sims Ely, receiver of The Arizona Mutual Savings and Loan Association, a corporation and of The Arizona Trust Company, a corporation, to the bill of complaint filed in the above-entitled cause, respectfully represents and shows:

This defendant as receiver for said corporations reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill comes and answers thereto and says that he admits each and all of the allegations contained in paragraphs I and II of said bill except that plaintiff is now the owner of or entitled to the possession of the notes alleged in said paragraph II given by the Arizona Trust Company to secure the payment of said note of Five Thousand and Five Hundred Thirty-two and no/100 (\$5,532.00) Dollars in [11] said paragraph mentioned and with respect to this denial says that heretofore, to wit, on the 27th day of February, 1913, by a decree of the above-entitled court duly made and entered in the case of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, and The Arizona Trust Company, it was found and determined that at the time of the attempted transfer by The Arizona Mutual Savings and Loan Association to The Arizona Trust Company of the assets of said The Arizona Mutual Savings and Loan Association, including the assets in-

volved in this section, The Arizona Trust Company, defendant herein, had no right, power or authority to receive from said The Arizona Mutual Savings and Loan Association, any of said assets and that said attempted transfer was for the reasons set forth in said decree, void and of no effect.

That subsequent to the rendition of said decree by an order and modification thereof, duly made and entered in the above-entitled court on the 12th day of March, 1914, in said action wherein said Charles W. Clark is complainant and The Arizona Mutual Savings and Loan Association, and The Arizona Trust Company are defendants, it was further ordered, adjudged and decreed that said attempted transfer of said assets was and is void, and in accordance with the terms of both of said decrees, the receiver was directed to receive and report to the Master in Chancery of this court, all claims against either said The Arizona Mutual Savings and Loan Association or The Arizona Trust Company, whether said claims should arise through claim as creditor should arise through claim as stockholder or either of said companies. [12]

That pursuant to said decree of March 12th, 1914, Edwin F. Jones, Master in Chancery, has notified all creditors, stockholders and claimants to present their claims to him for allowance or disallowance, and defendant further represents and shows that the complainant, Arthur A. Kline is a claimant either as a creditor or stockholder of The Arizona Mutual Savings and Loan Association or of The Arizona Trust Company, and as such creditor or stockholder should

be compelled to present his claims for allowance or disallowance to said Master in Chancery before being permitted to litigate his claims to the assets involved in this proceeding.

That said assets being the subject of this cause of action, are, under the terms of each of said decrees hereinabove mentioned, assets properly belonging to The Arizona Mutual Savings and Loan Association, for the reason as hereinabove set forth, that the officers and directors of said Loan Association were without power, right or authority to transfer said assets to The Arizona Trust Company, and said The Arizona Trust Company at the time when it transferred and set over or attempted to transfer and set over said assets to the said Arthur A. Kline as a stockholder or creditor of The Arizona Trust Company, was without right, power or authority so to do.

Defendant further represents and shows that at the time of the attempted transfer by The Arizona Mutual Savings and Loan Association to said The Arizona Trust Company, and by said The Arizona Trust Company to the said Arthur A. Kline of the assets being the subject of this litigation, the said [13] Arthur A. Kline was a stockholder in The Arizona Mutual Savings and Loan Association, which Loan Association was by the terms of both decrees hereinabove *mention*, at the time of said attempted transfers adjudged and declared to be an insolvent association and that the said Arthur A. Kline and all persons holding under or through him or claiming any right, title or interest in said assets is subrogated to the rights which the said Arthur A.

Kline at the time of said transfer held, owned or enjoyed as a stockholder in said insolvent Loan Association.

WHEREFORE, defendant alleges that complainant, Arthur A. Kline, is not the owner of any of said securities or assets being the subject of this litigation, except in so far as it may be determined by the Master in Chancery hereinabove mentioned, he shall be the owner to the extent of his proportionate interest as a stockholder in the assets which may be marshalled and collected by the Master and Receiver of said insolvent Arizona Mutual Savings and Loan Association, and distributed to the stockholders therein.

SIMS ELY,
Receiver of The Arizona Mutual Savings and Loan
Association and The Arizona Trust Company.
GEORGE J. STONEMAN,
REESE M. LING,
Solicitors for Defendant, 405-6-7 Goodrich Blk.,
Phoenix, Arizona.

[Endorsements]: Equity—E-25. In the District Court of the United States for the District of Arizona. Arthur A. Kline, Complainant, vs. The Arizona Mutual Savings and Loan Association, etc., Defendants. Answer of Sims Ely, Receiver. Served with a Copy of the Within Answer this 31 day of August, 1914. Thos. Armstrong, Jr., Ernest W. Lewis, R. L. Morgan, Solicitors for Complainant. Filed Sep. 2, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [14]

[Plaintiff's Exhibit "A"—Note of Arizona Trust Co.]

No. —. Phoenix, Arizona, March 2d, 1912.

On or before July 1st, 1912, after date, without grace, for value received, Arizona Trust Co. promises to pay to Arthur A. Kline or order the sum of Fifty-five hundred thirty-two and no/100 Dollars, with interest thereon at the rate of Eight per cent per annum from Date until paid. Interest payable at Maturity, and if not so paid to be added to the principal and become a part thereof, and to bear interest at the same rate; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Should suit be brought to recover on this note, said Company promises to pay as attorney's fees Five per Cent additional on amount found due on this note. Principal and interest payable in U. S. Gold Coin. All payable at The Valley Bank of Phoenix at Phoenix, Arizona.

ARIZONA TRUST COMPANY.

By A. J. EDWARDS,
Vice-president.

~~62858~~—10019.

\$5,532.00 100. Due July 1st, 1912.

ALF LE BARON,
Secy.

Note 93. The McNeil Co., Phoenix, Arizona.

[Endorsements]: Plffs. Ex. "A." in E-25, Kline vs. Ariz. Mut. Sav. & Loan Asso., et al. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk.

[Plaintiff's Exhibit "B"—Agreement, March 2, 1912, Arizona Trust Company to Valley Bank of Phoenix.]

Phoenix, Arizona, March 2d, 1912.

To The Valley Bank of Phoenix,
Gentlemen:

We herewith hand you note of the Arizona Trust Company for the sum of Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, due on or before the first day of July, 1912, bearing interest at the rate of eight per cent (8%) per annum from date until paid, payable to Arthur A. Kline. And we also hand you notes secured by mortgages on real estate in Arizona, on which notes there is due an aggregate amount at this time, at least equal to the said sum of Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, said last-mentioned notes and mortgages to be held by you in escrow as collateral security for the payment of said note of Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, said collateral notes and mortgages to be by you returned to the Arizona Trust Company upon the payment of said note for Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, payable to the said Kline, and if said note be not paid when due, you are hereby authorized and directed to deliver said collateral notes and mortgages to secure the same to the said Kline or to his order, for his said security, or to proceed to sell the same as such security in the manner provided by law.

It is hereby mutually agreed by and between the Arizona Trust Company and the said Arthur A.

Kline, that any of said notes and mortgages may be withdrawn from said escrow by the substitution therefor of notes and mortgages of equal aggregate amount of the notes and mortgages so withdrawn, provided said substituted notes and mortgages shall be considered by the said Valley Bank as being of equal value of said notes and mortgages so withdrawn. [16]

As soon as you have examined said collateral notes and mortgages and approved the same as security for said note of Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, you will deliver to the Arizona Trust Company, stock certificate #1260 of the Arizona Mutual Savings and Loan Association, issued to Florine Kline for forty (40) shares of Class "A" stock of said Association, and stock certificate #1408 for twenty (20) shares of the stock of said Arizona Mutual Savings and Loan Association, originally issued to A. Kaplan, and thereafter, and on the 8th day of January, 1903, assigned to Arthur A. Kline, which said certificates are also herewith handed you, and upon approving said notes and mortgages you may deliver said note for Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars to the said Kline, and hold said notes and mortgages as security therefor.

It is hereby agreed that if, at any time on or before the 15th day of March, 1912, the Arizona Trust Company desires to take up the said note for Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, with a discount of ten per cent (10%) thereon, the said note, with all of the collateral notes and mortgages as security therefor, shall be returned to the Arizona Trust Company, and the said debt can-

celled, upon the payment of said sum less ten per cent (10%).

IN WITNESS WHEREOF this instrument is executed in triplicate, this 2d day of March, 1912.

ARIZONA TRUST COMPANY.

[Ariz. Trust Co. Seal]

By A. J. EDWARDS,
Vice-president.

By ALF LE BARON,
ARTHUR A. KLINE.

Mar. 2, 1912.

Received the above papers for escrow.

THE VALLEY BANK OF PHOENIX,
LLOYD B. CHRISTY,
Cash. [17]

[Endorsements]: Plffs. Ex. "B." in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [18]

[Plaintiff's Exhibit "C"—Letter, March, 1912, Valley Bank of Phoenix to Arthur H. Kline.]

THE VALLEY BANK.

Established 1883.

CAPITAL \$150,000.00.

(Picture of E. J. Bennitt, President
Valley Bank) Geo. M. Halm, Vice-Prest.
LLOYD B. CHRISTY, Cashier.

S. H. Stewart, Asst. Cashier

PHOENIX, ARIZONA.

March 6, 1912.

Mr. Arthur H. Kline,
El Paso, Texas.

Dear Sir:

Replying to your favor of the 5th will state that we

have already undertaken to find out the value of the notes that you and Mr. Edwards left here. As soon as I get that information I will then ask Mr. Edwards to let me know how much money has been paid on each of the mortgages and I will then be able to give you the information that you want.

Yours very truly,

THE VALLEY BANK OF PHOENIX,
LLOYD B. CHRISTY,
Cashier.

[Endorsements]: Plffs. Ex. "C" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [19]

**[Plaintiff's Exhibit "D"—Letter, April 29, 1912,
Valley Bank of Phoenix to Arthur H. Kline.]**

THE VALLEY BANK.

Established 1883.

CAPITAL \$150,000.00.

(Picture of
Valley Bank)

E. J. Bennitt, President
Geo. M. Halm, Vice-Prest.
Lloyd B. Christy, Cashier
S. H. Stewart, Asst. Cashier

PHOENIX, ARIZONA.

April 29, 1912.

Mr. Arthur H. Kline,
El Paso, Texas.

Dear Sir:

I am in receipt of your favor of the 27th about the note of \$5,532.00 of the Arizona Trust Company with collateral, left with us in escrow for your account.

I made inquiry as to the value of the collateral and found that it was not what you call gilt edge, but I

think it is absolutely good for the amount that it stands for.

We would not care to discount the note at this time as we have too many loans on hand ourselves.

Yours very truly,
THE VALLEY BANK OF PHOENIX,
LLOYD B. CHRISTY,
Cashier.

[Endorsements]: Plffs. Ex. "D" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [20]

[Plaintiff's Exhibit "E"—Note of Wardlop and Girodon et ux.]

Bisbee, Arizona, October 12th,

On or before the expiration of six years from the date hereof we promise to pay to the ARIZONA MUTUAL SAVINGS & LOAN ASSOCIATION, the sum of Fifteen hundred (\$1,500.00) dollars, being in repayment to said association of a loan for that amount made to us this day, with interest thereon at the rate of six per cent per annum, payable monthly, on the first day of each and every month hereafter; said loan is made to us as members of said Association, under, and subject to the provisions of its Articles of Incorporation and its By-laws, Rules, Regulations and Resolutions, all of which shall be deemed a part of this agreement to all intents and purposes as if written out in full herein, and to which we agree to conform.

We further agree to pay to said Association on the first day of each and every month during the time which this loan shall continue, the further sum of

Sixteen and 50/100 (\$16.50) dollars as premiums upon said loan; and we further agree to pay to said Association on the first day of each and every of said months, the further sum of Twenty-five and no/100 (\$25.00) dollars, being the monthly installments of the subscription price for fifty "A" shares of the Capital Stock of the said Association, for which we have subscribed; and we further agree to pay all the fines that may be assessed against us by said Association under its said Articles of Incorporation and By-laws, Rules, Regulations and Resolutions and in accordance with and subject to the conditions thereof.

Whenever the aggregate amount of the monthly installments of the subscription price of said stock paid hereunder and all earnings on said stock apportioned to us shall equal the amount of Five thousand (\$5,000.00) dollars, premiums, interest and fines made and imposed by and under the By-laws of said Association then this obligation shall be deemed to be paid and satisfied, and said stock to that extent be deemed cancelled. If the then paid up value of said stock shall exceed such loan, interest, premiums, fines, costs and other additions to the debt hereby secured, then such excess shall [21] be paid by said Association to said Theophile Wardlop and Andre Girodon, their heirs or assigns.

The payment and performance of this obligation is secured by a mortgage on real estate and is subject to the provisions contained in said mortgage.

All payments shall be made without notice or demand, at the office of said Association at Phoenix,

Arizona, or to the local Treasurer of said Association at Bisbee, Arizona.

THEOPHILE WARLOP.

EMMA GIRODON.

ANDRE GIRODON.

By EMMA GIRODON,

Atty. in Fact.

MARY WARLOP,

By THEOPHILE WARLOP,

Her Atty. in Fact.

[Endorsements]: No. 119. Real Estate Mortgage Note from Theophile Wardlop and Wife, Andre Girodon and Wife, Bisbee, Arizona. Amount—\$1,500.00. Dated October 12th, 1905. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company. Plffs. Ex. “E.” in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [22]

\$500.00

No. 246.

[Plaintiff's Exhibit “F”—Note of Emmett W. Booker.]

Phoenix, Arizona, April 1st, 1910.

During One Hundred and Three (—103—) months after date, without grace, for value received, I, we, or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office in the City of Phoenix, Maricopa County, Arizona Territory, the sum of Five Hundred (\$500.00) Dollars, together with the further sum of Four Hundred Seventy Eight 50-100

(\$478.50) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in One Hundred and Three (103) monthly installments of Nine and 50-100 (\$9.50) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of Twenty Cents (\$0.20) Dollars per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Seventy Five (\$75.00) Dollars is collected by an attorney, foreclosure proceedings, sale or suit, shall be

paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by Emmett W. Booker, (Unmarried), to the said Arizona Mutual Savings and Loan Association.

EMMETT W. BOOKER. [23]

[Endorsements]: No. 246. Real Estate Mortgage Note from Emmett W. Booker. (Unmarried) Amt. \$500.00. Dated April 1st, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company. Plffs. Ex. "F" in E-25 Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [24]

[Plaintiff's Exhibit "G"—Note of Smith et ux.]

This note has been paid in full by the undersigned, the present owner of the property described in a mortgage given by Earl E. Smith and Adelaide Smith to the Arizona Mutual Savings and Loan Association to secure this note recorded in Book 69 of Mortgages P. 558, Co. Rec. office, Maricopa County, Arizona and which mortgage has been satisfied of record by Sims Ely, Receiver. Elizabeth H. Smith. By Robt. E. Morrison, her Attorney.

\$400.00

No. 250

Phoenix, Arizona, August 1st 1910.

During One Hundred & Three (—103—) months after

date, without grace, for value received, I, we, or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office in the City of Phoenix, Maricopa County, Arizona Territory, the sum of Four hundred (\$400.00) Dollars, together with the further sum of Three hundred eighty two & 80/100- (\$382.80-) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in One Hundred Three (103) monthly installments of Seven and 60/100 (\$7.60) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of fifteen cents (\$0.15) Dollars per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole

principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Seventy-five (\$75.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by Earl E. Smith and Adelaide Smith, husband and wife, to the said Arizona Mutual Savings and Loan Association.

EARL E. SMITH.

ADELAIDE SMITH. [25]

[Endorsements]: No. 250. Real Estate Mortgage Note from Earl E. Smith and Adelaide Smith, husband and wife. Amt. \$400.00. Dated August 1st, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company. Plffs. Ex. "G" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [26]

Plaintiff's Exhibit "H" [Note of Jennings et ux.]

\$800.00

No. 253.

Phoenix, Arizona, September 1st, 1910.

During One Hundred & Three (-103-) months after date, without grace, for value received, I, we, or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office in the City of Phoenix, Maricopa County, Arizona Territory, the sum of Eight Hundred (\$800.00) Dollars, together with the further sum of Seven Hundred Sixty-five & 60-100 (\$765.60) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in One Hundred and Three (103) monthly installments of Fifteen and 20-100 (\$15.20) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of thirty cents (\$0.30) Dollars per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum.

Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Eighty (\$80.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by Oscar W. Jennings and Emma B. Jennings, husband and wife, to the said Arizona Mutual Savings and Loan Association.

OSCAR W. JENNINGS.

EMMA B. JENNINGS. [27]

Endorsements: No. 253. Real Estate Mortgage Note from Oscar W. Jennings and Emma B. Jennings, his wife. Amt. \$800.00 dated September 1st, 1910. Arizona Mutual Savings & Loan Association by J. L. Olsen, Secy. Arizona Trust Company. Plffs. Ex. "H" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [28]

[Plaintiff's Exhibit "I"—Note of Alger et ux.]

\$600.00

No. 258

Phoenix, Arizona, October 1st. 1910.

During One Hundred & Three (-103-) months after date, without grace, for value received, I we, or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office in the city of Phoenix, Maricopa County, Arizona Territory, the sum of SIX HUNDRED (\$600.00) Dollars, together with the further sum of Five hundred seventy four & 20/100 (\$574.20) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in ONE HUNDRED AND THREE (103) monthly installments of Eleven & 40/100 (\$11.40) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of Twenty five cents, (\$0.25) Dollars per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum.

Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Seventy Five (\$75.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by Thomas G. Alger and Sarah P. Alger, husband and wife, to the said Arizona Mutual Savings and Loan Association.

THOMAS G. ALGER.

SARAH P. ALGER.

Witness.

J. T. OWENS. [29]

[Endorsements]: No. 258. Real Estate Mortgage Note from Thomas P. Alger and Sarah P. Alger. Amt. \$600.00. Dated October 1st, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen,

Secy. Arizona Trust Company. Plffs. Ex. "I" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [30]

**[Plaintiff's Exhibit "J"—Note of Phoenix
Construction & Supply Co.]**

\$2000.00

No. 261

Phoenix, Arizona, November 25th, 1910.

During One Hundred & Three (103) months after date, without grace, for value received, I, we, or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office — in the City of Phoenix, Maricopa County Arizona Territory, the sum of TWO THOUSAND, (\$2000.00) Dollars, together with the further sum of NINETEEN HUNDRED & FOURTEEN, (\$1914.00) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in ONE HUNDRED & THREE (103) monthly installments of THIRTY EIGHT, (\$38.00) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of Eighty Cents (\$0.80) Dollars per month (for each installment so in default) for each and every month that any such in-

installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of ONE HUNDRED & FIFTY (\$150.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payees, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by PHOENIX CONSTRUCTION & SUPPLY COMPANY (a Cor-

poration) to the said Arizona Mutual Savings and Loan Association.

PHOENIX CONSTRUCTION AND SUPPLY COMPANY,

By N. R. CHRISTMAN,
Vice-President.

E. B. ZACHRY,
Treasurer.

[Seal] Attest:

E. B. ZACHRY,
Secretary. [31]

[Endorsements]: No. 261. Real Estate Mortgage Note from Phoenix Construction & Supply Co., (a Corp.) Amt. \$2,000.00 Dated November 25th, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company. Plffs. Ex. "J" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk. [32]

[Plaintiff's Exhibit "K"—Letter, June 17, 1911, Arizona Mutual Savings & Loan Assn. to A. A. Kline.]

R. H. Brooks, Treasurer.

W. W. McNeff, President.

F. L. Blumer, Manager.

W. M. Fickas, Vice-President.

A. J. Edwards, Attorney.

LeRoy H. Civile, Secretary.

Alf. B. Le Baron, Field Manager.

ARIZONA MUTUAL SAVINGS & LOAN ASSN.

6/19

Lock Box 605.

Phoenix, Arizona, June 17th, 1911.

Mr. A. A. Kline,

El Paso, Texas.

Dear Sir:

Replying to your favor of June 7th, which should have been answered earlier, but for the fact that I have been so busy since elected to the office of secre-

tary less than a month ago, on account of the former secretary being called East, owing to illness in the family, and without sufficient time to explain everything in the office to me, beg to say that if some officer of the Association has informed you or anyone else that Class "A" stock held by you is withdrawable or matured at this time, it was evidently under a misapprehension of the facts.

An examination of the stock account of Mrs. Florine Kline indicates that it will mature about the first of January, and probably be worth a little more than par and your twenty shares would be so nearly matured that the stockholders meeting might vote to permit its withdrawal, if you desire to do so.

The value at the present time of certificate #1408 is \$1647.99. The value of certificate #1260 is \$3674.02, but they are not withdrawable at present. However, any payments that are made in the future, will be credited and the earnings of the same, of course, credited, and if it amounts to more than par at the time the dividend credits causes maturity, you will be paid the excess just the same.

Hoping you will find this satisfactory, and assuring you of our best endeavors in the matter for the benefit of all stockholders we beg to remain,

Yours very truly,

ARIZONA MUTUAL SAVINGS & LOAN
ASSN.

LEROY H. CIVILLE,

Secretary.

Dict.—FGK.

[Endorsements]: Plffs. Ex. "K" in E-25. Admitted and Filed Jan. 22, 1915. George W. Lewis, Clerk.[33]

Plaintiff's Exhibit "L"—[Letter, July 12, 1911, Arizona and Mutual Savings & Loan Assn. to A. A. Kline.]

R. H. Brooks, Treasurer.

W. W. McNeff, President.

F. L. Blumer, Manager.

W. M. Fickas, Vice-President.

A. J. Edwards, Attorney.

LeRoy H. Civile, Secretary.

Alf. B. Le Baron, Field Manager.

ARIZONA MUTUAL SAVINGS & LOAN ASSN.

Lock Box 605.

Phoenix, Arizona, July 12th, 1911.

Mr. Arthur A. Kline,

El Paso, Texas.

Dear Sir:

Replying to your favor of the 3rd. inst. would say that our records show that you have made payments including the month of June. Any notice that was sent you must have been an error, caused by the fact that we have been so busy in the office recently that we have been unable to keep up with the work promptly.

Referring to your letter of June 19th, and your mention of the same in your letter of July 3rd, would say that the writer was new in the office at the time that letter was received and desired to consult with some of the other officers who were out of town at the time. The letter was mislaid, hence the delay in answering.

You ask whether advance payments could be made on certificates #1260 and #1408 and in reply have to say that I am advised that this cannot be done.

The advance payments, of course, could be made and when the annual meeting is held in January and dividends are portioned, the payments will draw their proportion of dividends and enhance the value of your stock, but, at the same time, you can understand that paying in money at this time and withdrawing it immediately would be of no service to the association, and it would simply be a matter of book keeping to withdraw stock which is not at present withdrawable. No officer of the company would have any authority to make any change in the situation. There will be no trouble, however, about your getting the money on these certificates in January, but I see no way of getting it before that time.

I regret that we have delayed answering your letter and trust it has not caused you any inconvenience.

Yours very truly,
ARIZONA MUTUAL SAVINGS & LOAN
ASSN.

LEROY H. CIVILLE,
Secretary.

Dict.

AJE/GLF.

[Endorsements]: Plffs. Ex. "L" in E-25. Admitted and filed Jan. 22, 1915. George W. Lewis, Clerk. [34]

[Plaintiff's Exhibit "O"—Note and Collateral Notes
in Escrow.]

NOTE AND COLLATERAL NOTES IN ESCROW
NO. 508.

From Arthur A. Kline, El Paso (hereinafter
called the first party), to Arizona Trust Co. (here-
inafter called the second party).

Total Consideration, \$5532 and int.

To THE VALLEY BANK,
Phoenix, Arizona.

This Envelope is deposited with you in Escrow, sub-
ject to the following

INSTRUCTIONS.

The within papers are to be delivered to the above
designated second party, its order or assigns, upon
demand, if said second party, its agent or assigns,
shall deposit with you for the credit and use of the
above designated first party, the full amount of the
total consideration hereinabove written; the time
and terms of payment being as follows, to wit:

1st	Payment to be made on or before 7-1.....	1912	\$5532
2nd	" " " " " " "	19..	\$....
with interest @ 8 % from 3/2-12			
3rd	" " " " " " "	19..	\$....
4th	" " " " " " "	19..	\$....
5th	" " " " " " "	19..	\$....
6th	" " " " " " "	19..	\$....
7th	" " " " " " "	19..	\$....
8th	" " " " " " "	19..	\$....
9th	" " " " " " "	19..	\$....
10th	" " " " " " "	19..	\$....

But if said payments or any of them are not made
at the times and in the amounts hereinabove stated,

you will accept no further payments and deliver enclosed papers to

.....
or order, on demand, time being of the essence of these instructions:

You are hereby released from any and all liability and claim or claims whatsoever in connection with receiving, retaining and delivering the same, except that in case any payment is made hereon, as above stated, you will credit as per above instructions, less your charge of \$1.00 per \$1000.00 of the amounts so paid, together with the amount, if any, paid by you for legal expenses connected herewith, which amount you are hereby authorized to deduct and hold out.

These charges, in addition to the charge for filing and indexing required at the time papers are deposited, being the minimum as fixed by the Associated Banks of Phoenix.

Dated at Phoenix, Ariz, A. D. 19..

Filed and indexed Mar. 16, 1912.

(.....

(.....

(.....

(.....

Received the within papers this — day of
 —, 19—.

FEE
 For Filing and
 Indexing, \$2.00

Papers inclosed
 sent Mr. Kline via
 Mail by Cashier
 9-17-12

[Endorsements]: Aug. 8-12. Pd. interest \$200,-
 00. Plffs. Ex. "O" in #E-25. Admitted and filed
 Jan. 23, 1915. George W. Lewis, Clerk. [36]

[Minutes of Hearing, January 22, 1915.]

*United States District Court for the District of
 Arizona.*

Minute Entry Appearing Under Date of January
 22d, 1915.

No. E-25.

ARTHUR A. KLINE,

Plaintiff,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
 ASSOCIATION, et al.,

Defendants.

This cause came on regularly for hearing before the Court on this day, the plaintiff appearing in person and by Messrs, Armstrong & Lewis, Esquires, his attorneys, and the defendant by Sims Ely, receiver, appearing in person and by George J. Stoneman, Esquire, his attorney. The complaint of the plaintiff is read by his attorney and the answer of Sims Ely, receiver, of the Arizona Mutual Savings

and Loan Association and the Arizona Trust Company, is read by counsel. H. R. Person is duly sworn as court reporter in this case. Plaintiff offers in evidence exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I" and "J," which are admitted and filed. Arthur A. Kline is called as a witness upon behalf of the plaintiff, duly sworn, examined and cross-examined. Plaintiff offers in evidence exhibits "K" and "L," which are admitted and "M," and "N," which are excluded and filed. Thereupon, the plaintiff rests its case.

Upon the stipulation and misunderstanding made and had in open court that the decrees made by this Court on February 27, 1913, and March 12, 1914, in the case of Clark vs. Arizona Mutual Savings and Loan Association et al., shall be considered as offered in evidence in this case, subject to the objections thereto on behalf of the plaintiff set out in the reporter's transcript of the evidence herein, the defendants rest their case. The hour of adjournment having arrived and the trial of this case not [37] being complete, IT IS ORDERED that the further trial hereof be and the same is hereby adjourned and continued until 9:30 o'clock A. M., on Saturday, the 23d day of January, A. D. 1915. [38]

[Minutes of Hearing, January 23, 1915.]

*United States District Court for the District of
Arizona.*

Minute Entry Appearing Under Date of January
23d, 1915.

No. E-25.

ARTHUR A KLINE,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, et al.,

Defts.

Trial of this case is this day resumed pursuant to an order or adjournment made on yesterday, plaintiff being represented by Messrs. Armstrong & Lewis, Esquires, his attorneys, and the defendants by George J. Stoneman, Esquire, their attorney, and Sims Ely, receiver, being present in open court. Plaintiff's Exhibit "O," offered in evidence, is admitted and filed under stipulation as set out in the testimony. Thereupon, plaintiff rests its case and the defendants rests its case. The testimony being closed and no further evidence offered, argument is had by counsel for the plaintiff; and the defendants thereupon ask leave to present arguments upon behalf of the defendants in the form of written brief to be delivered to the Court at a future date, and leave is so granted by the Court. The plaintiff thereupon asks leave to file a reply in writ-

ing to the defendants' brief and leave to file the same is accordingly granted by the Court. [39]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—No. E-25.

ARTHUR A KLINE,

Complainant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation; THE ARI-
ZONA TRUST COMPANY, a Corporation;
and SIMS ELY, as Receiver of the Arizona
Mutual Savings and Loan Association, and as
Receiver of the Arizona Trust Company,
Defendants.

Decree.

This cause, having come on regularly for hearing in the above-entitled court, on the 23d day of January, 1915, plaintiff being present in court in person and by his counsel, Messrs. E. W. Lewis and Thomas Armstrong, Jr., and defendants represented by Sims Ely, receiver, being present in court in person and by his counsel, George J. Stoneman, and oral and documentary evidence having been introduced by plaintiff in support of the allegations of his Bill of Complaint, and oral and documentary evidence having been submitted by defendant, Sims Ely, in support of the allegations contained in his answer thereto; and argument having been had and said

cause having been continued by order of this Court from term to term; and this Court being now fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that complainant, Arthur A. Kline, take nothing by this action and that he is not the owner of, nor entitled to possession of any of the securities or assets being the subject of this litigation, except in so far as it may be determined by the Master in Chancery appointed in equity cause No. 53; that the said Arthur A. Kline shall be the owner of stock, [40] either in The Arizona Trust Company or The Arizona Mutual Savings & Loan Association, to which extent complainant shall be entitled to his proportionate interest as such stockholder in any of the assets of either of said corporations which may be marshalled and collected by the Master appointed in said equity cause No. 53 and Sims Ely, receiver.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants and Sims Ely, receiver, do have and recover from plaintiff their costs in this behalf established, \$9.20.

WM. H. SAWTELLE,
Judge.

Dated at Phoenix, Arizona, October 4th, 1915.

[Endorsements]: In Equity—No. E-25. In the District Court of the United States for the District of Arizona. Arthur A. Kline, Complainant, vs. The Arizona Mutual Savings and Loan Association, a Corporation; The Arizona Trust Company, a Corporation; and Sims Ely, as Receiver of the Arizona

Mutual Savings and Loan Association, and as Receiver of the Arizona Trust Company, Defendants. Decree. Filed Oct, 4, 1915. George W. Lewis, Clerk. [41]

[Order Admitting Certain Decrees in Evidence.]

*United States District Court for the District of
Arizona.*

Minute Entries Appearing Under Date of October
4th, 1915.

No. E—25.

ARTHUR A KLINE,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, et al.,

Defendants.

IT IS ORDERED by the Court that the decrees made and entered by this Court on February 27, 1913, and March 12, 1914, in the case of Charles W. Clark vs. Arizona Mutual Savings and Loan Association, et al., in Equity No. 53 (Phoenix), be and the same are hereby admitted in evidence over the objections of the plaintiff, set out in the reporter's transcript of the evidence herein, to which ruling and action of the Court the plaintiff then and there excepts and asks that such exception be noted upon the records and the same is accordingly done by the clerk.

[Order Entering Exception to Decree, etc.]

No. E—25.

ARTHUR A. KLINE,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, et al.,

Defendants.

A decree having been this day entered by the Court in favor of the defendants herein and the plaintiff, by counsel, having excepted to the decree and order of the Court entering judgment in favor of the defendants herein and asked that such exception be noted upon the record, IT IS ORDERED that said exception be and the same is hereby entered. [42]

[Order Allowing Appeal and Fixing Amount of Bond.]*United States District Court for the District of
Arizona.*Minute Entry Appearing Under Date of October
29th, 1915.

No. E—25 (Phoenix).

ARTHUR A KLINE,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION et al.,

Defendants.

Comes now the plaintiff by his attorney and gives notice, in open court, of an appeal from the decision of this Court to the United States Circuit Court of Appeals for the Ninth Circuit and files his Assignment of Errors; and thereupon,

IT IS ORDERED by the Court that the appeal be allowed and that the cost bond of the plaintiff on appeal be, and the same is, hereby fixed in the sum of Five Hundred and no/100 (\$500.00) Dollars, conditioned according to law and to be approved by the clerk of this court. [43]

[Stipulation Continuing Stipulation in Force and Effect Until Decision by Circuit Court of Appeals.]

United States District Court for the District of Arizona.

Minute Entries Appearing Under Date of October 29th, 1915.

No. E—25.

ARTHUR A. KLINE,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION et al.,

Defendants.

It is stipulated by counsel in open court, E. W. Lewis, Esquire, appearing upon behalf of the plaintiff, and George J. Stoneman, Esquire, appearing upon behalf of the defendants, that the stipulation

on file herein shall continue in full force and effect until this case shall be decided by the Circuit Court of Appeals of the United States for the Ninth Circuit.

**[Order That U. S. District Court Stand at Recess
Until January 10, 1916.]**

IT IS ORDERED that the United States District Court for the District of Arizona do now stand at recess until Monday, the 10th day of January, A. D. 1916, at the hour of ten o'clock A. M. [44]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—No. E-25 (Phoenix).

ARTHUR A. KLINE,

Complainant and Appellant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-
CIATION et al.,

Defendants and Appellees.

Assignments of Error.

Comes now the above-named appellant, Arthur A. Kline, by his solicitors, Thomas Armstrong, Jr., Ernest W. Lewis and R. L. Morgan, and says that in the record and proceedings in the above-entitled cause in the District Court of the United States for the District of Arizona there is manifest error in this, to wit:

I.

That the Court erred in admitting in evidence the decree entered in the above-entitled court in the case

of Charles W. Clark versus the Arizona Mutual Savings & Loan Association et al., dated February 27, 1913, and the decree entered in said court on the 12th day of March, 1914, in said last-mentioned action, wherein said court did decree that at the time of the transfer by the Arizona Mutual Savings & Loan Association to the Arizona Trust Company of the assets of the said Arizona Mutual Savings & Loan Association, including the assets the subject of litigation herein, the Arizona Trust Company had no right, power or authority to receive from said Arizona Mutual Savings & Loan Association any of said assets and that said attempted [45] transfer was void and of no effect, over the objections of complainant and appellant duly entered of record in said cause, to wit:

“We object to the competency and relefency of the judgments themselves upon the ground that Arthur A. Kline was not a party to said litigation and that his interest, if any he had, initiated prior to the institution of the suit of Clark versus the Arizona Mutual Savings & Loan Association, et al., and, therefore, we are not bound by any decree which may be rendered in the Clerk Litigation”;

to which ruling admitting said judgments the complainant and appellant then and there excepted, which exception was noted of record.

II.

The District Court erred in holding that the judgments entered by said Court in the said cause of Charles W. Clark, complainant, versus the Arizona Mutual Savings & Loan Association, et al., defend-

ants, wherein it was decreed that the transfer of the assets of the Arizona Mutual Savings & Loan Association to the Arizona Trust Company was void, determined and established as against the complainant and appellant herein, he not being a party to said litigation and his rights, if any, having initiated prior to the institution of said cause of Clark versus the Arizona Mutual Savings & Loan Association, et al., that the Arizona Trust Company had no title to the collateral pledged to this complainant and that therefore this complainant had no right to the possession of said collateral as against the receiver, Sims Ely, appointed in said cause of Clark, versus the Arizona Mutual Savings & Loan Association, et al.

III.

Said District Court erred in holding and decreeing that the complainant, Arthur A. Kline, take nothing by his said action and that he is not the owner nor entitled to the possession [46] of any of the securities or assets, the subject of this litigation, of the reason that all of the competent evidence introduced upon the trial of said cause shows that said Arthur A. Kline, on or about March 2, 1912, and more than five months prior to the institution of the cause of Charles W. Clark versus the Arizona Mutual Savings & Loan Association, et al., sold to the Arizona Trust Company stock in the Arizona Mutual Savings & Loan Association and in consideration therefor received of and from the Arizona Trust Company its certain promissory note due on or before July 1, 1912, in the sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00) with

interest and attorneys fees, which note was and is unpaid, and that at the time of the execution and delivery of said note and to secure the payment thereof the said Arizona Trust Company endorsed in blank and delivered to the Valley Bank in pledge for the use of the said Arthur A. Kline certain negotiable promissory notes secured by mortgages on real estate in Arizona, as follows:

No.				
119	E. E. Wardlop,	Bisbee,	\$1,500.00	\$1,500.00
246	E. W. Booker,	Globe,	500.00	500.00
250	E. E. Smith, et al.,	Wickenburg,	339.25	400.00
253	O. W. Jennings, et al.,	"	688.00	800.00
268	Thos. P. Alger,	Safford,	564.00	600.00
261	Phoenix Construction Co.,	Phoenix,	1,982.00	2,000.00
			<hr/>	<hr/>
			\$5,573.25	\$5,800.00

and that at the time of the pledging of said notes to the said Arthur A. Kline, each and all of said promissory notes, save and except No. 119, E. E. Wardlop, were unmatured and were in the actual possession of the said Arizona Trust Company and endorsed in blank by the Arizona Mutual Savings & Loan Association, and that at that time said Kline was entitled to rely upon and did rely upon such plenary evidence of title in said Arizona Trust Company, and by virtue of the pledge aforesaid did become entitled to the possession thereof until said principal note was paid. [47]

IV.

The District Court erred in holding that as to the unmatured notes pledged to said Kline said Kline was not an innocent holder in due course for value.

V.

The District Court erred in holding that said Kline

take nothing by his said action and that he is not the owner of nor entitled to the possession of any of the securities or assets being the subject of said litigation, for the reason that the undisputed competent evidence in said cause shows that the said Arizona Mutual Savings & Loan Association clothed the Arizona Trust Company with apparent title to the collateral the subject of this litigation, and placed said trust company in possession thereof and thereby gave the said Arizona Trust Company the opportunity to pledge said collateral to said Kline he being an innocent purchaser, for value, thereby estopping the said Arizona Mutual Savings & Loan Association and its said receiver, Sims Ely, from claiming said collateral as against the said Kline until the payment of the note to secure which said collateral was pledged.

VI.

The District Court erred in holding that said Kline was not an innocent purchaser of said collateral for value.

VII.

The District Court erred in holding that said Kline had any notice or knowledge of the insolvency of the said Arizona Mutual Savings & Loan Association or defect in the title of the Arizona Trust Company to said collateral, at the time of the pledging of said collateral.

VIII.

The District Court erred in entered judgment in favor of the defendants herein, said judgment being contrary to the law and the competent evidence in the case. [48]

IX.

The District Court erred in not rendering judgment in favor of the appellant in accordance with the prayer of the bill.

WHEREFORE, appellant prays that the judgment and decision of the District Court of the United States for the District of Arizona in this cause be reversed and that said Court be directed to enter said judgment of reversal, and that appellant recover his costs herein and have such other orders and relief in the premises as may be just.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. L. MORGAN,

Solicitors for Appellant.

[Endorsements]: In the District Court of the United States for the District of Arizona. Arthur A. Kline, Complainant and Appellant, vs. Arizona Mutual Savings & Loan Association, et al., Defendants and Appellee. In Equity—No. E-6 Phoenix. Assignments of Error. Filed Oct. 29, 1915. George W. Lewis, Clerk. [49]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—No. E-25 (Phoenix).

ARTHUR A. KLINE,

Complainant and Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION, a Corporation, et al.,
Defendants and Appellees.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Arthur A. Kline, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Arizona Mutual Savings and Loan Association, a corporation; The Arizona Trust Company, a corporation; and Sims Ely, as receiver of the Arizona Mutual Savings and Loan Association, and as receiver of the Arizona Trust Company, the defendants in the above-entitled cause, in the sum of Five Hundred Dollars (\$500.00) lawful money of the United States, to be paid to them and their respective successors; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Executed this the 30th day of October, 1915.

WHEREAS, the above-named complainant and appellant, Arthur A. Kline is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco, California, to reverse the decree of [50] the District Court of the United States for the District of Arizona, in the above-entitled cause,

NOW, THEREFORE, the condition of this obligation is such that if the above-named complainant and appellant, Arthur A. Kline, shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void,

otherwise to remain in full force and effect.

ARTHUR A. KLINE,

Principal,

UNITED STATES FIDELITY & GUAR-
ANTY CO.,

[Seal]

By JOHN J. SWENEY,

Its Attorney in Fact,

By EARL S. CURTIS,

Its Attorney in Fact,

Surety.

The foregoing bond is approved this 30th day of
October, 1915.

GEORGE W. LEWIS,

Clerk of the District Court of the United States for
the District of Arizona.

By R. E. L. Webb,

Deputy.

[Endorsements]: In the District Court of the
United States for the District of Arizona. Arthur
A. Kline, Complainant, vs. The Arizona Mutual Sav-
ings & Loan Association, a Corporation, et al., De-
fendants. In Equity—No. E-25, Phoenix. Bond
on Appeal. Thos. Armstrong, Jr., Ernest W. Lewis,
R. L. Morgan, Solicitors for Complainant and Ap-
pellant, 310-315 Nat'l Bank of Ariz. Bldg, Phoenix,
Arizona. Filed Oct. 30, 1915, at — M. George W.
Lewis, Clerk. By R. E. L. Webb, Deputy. [51]

*In the District Court of the United States for the
District of Arizona, Phoenix Side.*

IN EQUITY—No 25.

ARTHUR A. KLINE,

Complainant and Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION, a Corporation, et al.,
Defendants and Appellees.

**Order [Enlarging Appellant's Time to December 29,
1915, to Docket Case and File Record Thereof
in U. S. Circuit Court of Appeals].**

Good and sufficient cause having been first shown to this Court that the time allowed by Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit in which the appellant has to Docket his case and file the record thereof on appeal with the clerk of the court of said Circuit at San Francisco, California, ought to be enlarged and extended thirty days from November 29th, 1915.

IT IS THEREFORE ORDERED, That the time in which the appellant in the above-entitled case has under said rule 16 to docket his case and file the record thereof with said clerk on appeal, be, and the same is hereby enlarged and extended thirty days from the 29th day of November, 1915.

Dated this the 24 day of November, A. D. 1915.

WM. H. SAWTELLE,

Judge. [52]

[Endorsements]: No. E-25. In the United States District Court for the District of Arizona. Arthur A. Kline, Plaintiff, vs. Arizona Mutual Savings & Loan Association, a Corporation, et al., Defendants. Order. Filed November 24, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [53]

*In the United States District Court for the District
of Arizona.*

IN EQUITY—No. E-25 (Phoenix).

ARTHUR A. KLINE,

Plaintiff,

vs.

THE ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION, a Corporation, et al.,
Defendants.

**Certificate of Clerk of United States District Court
to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify the fifty-three (53) typewritten pages, number from one (1) to fifty-three (53), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in

the office of the clerk of said district court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

[54]

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for mak- ing typewritten transcript of record— 193 folios at 30¢ per folio.....	\$57.90
Certificate of clerk to typewritten transcript of record, 4 folios.....	1.20
Seal to said certificate.....	.40
	<hr/>
	59.50

I hereby certify that the above cost for preparing and certifying record, amounting to \$59.50, has been paid to me by Ernest W. Lewis, Esquire, one of counsel for the plaintiff herein.

I further certify that I hereto attach and herewith transmit the original Waiver of Citation and Statement of the Evidence in this cause.

WITNESS my hand and the Seal of said District

Court, affixed this 27th day of November, A. D., 1915,
at Phoenix, Arizona.

[Seal]

GEORGE W. LEWIS,
Clerk.

By R. E. L. Webb.
Deputy Clerk. [55]

*In the District Court of the United States for the
District of Arizona, Phoenix Side.*

IN EQUITY—No. E-25.

ARTHUR A. KLINE,
Complainant and Appellant,
vs.

THE ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION, a Corporation, et al.,
Defendants and Appellees.

Waiver of Citation.

Come now the defendants and appellees, in the above-entitled suit, by their solicitor, George J. Stoneman, and hereby expressly waive the issuance of a citation herein, and service thereof, of this an appeal by the appellant herein to the United States Circuit Court of Appeals of the Ninth Circuit, sitting at the City of San Francisco, California, and the appellees hereby agree to enter their appearance to said appeal without the service of a citation on them or either of them.

Dated this the 3d day of November, 1915.

GEORGE J. STONEMAN,
Solicitor for the Defendants and Appellees Here-
in. [56]

[Endorsed]: In Equity—No. 25. In the District Court of the United States for the District of Arizona, Phoenix Side. Arthur A. Kline, Complainant and Appellant, vs. The Arizona Mutual Savings & Loan Association, et al., Defendants and Appellees. Waiver of Citation. Filed Nov. 3, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [57]

*In the District Court of the United States, for the
District of Arizona.*

IN EQUITY—No. E-25 (Phoenix).

ARTHUR A. KLINE,

Complainant and Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND
LOAN ASSOCIATION, a Corporation et al.,
Defendants and Appellees.

Statement of the Evidence.

Be it remembered that the above-entitled cause came on regularly to be heard in the above-entitled court before the Honorable William H. Sawtelle, Judge, this 22d day of January, 1915, at 2:00 o'clock P. M. The plaintiff was present in court and represented by his solicitor, Ernest W. Lewis, and the defendants by their solicitor, George J. Stoneman. Thereupon the following proceedings were had:

[Proceedings had January 22, 1915.]

Plaintiff's Case.

The plaintiff offered the note of the Arizona Trust Company, dated March 2, 1912, in favor of A. A.

Kline for \$5,532 with interest and other conditions as therein stated, which note was admitted in evidence and marked as Plaintiff's Exhibit "A," and which is in words and figures following, to wit:

"Phoenix, Arizona, March 2nd, 1912.

No. —

On or before July 1st, 1912, after date, without grace, for value received, Arizona Trust Co. promises to pay to Arthur A. Kline or order the sum of Fifty-five hundred thirty-two and no/100 Dollars, with interest thereon at the rate of Eight per cent per annum from Date until paid. Interest payable at maturity, and if not so paid to be added to the principal and become a part thereof, and to bear interest at the same rate; [58] and should the interest not be paid when due then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder of this note. Should suit be brought to recover on this note, said Company promises to pay as attorney's fees Five per cent additional on amount found due on this note. Principal and interest payable in U. S. Gold Coin. All payable at the Valley Bank of Phoenix at Phoenix, Arizona.

ARIZONA TRUST COMPANY,

By A. J. EDWARDS,

Vice-President.

ALF C. LE BARON,

Secy.

\$5,532.00. Due July 1st, 1912."

Plaintiff offered the instructions to the Valley Bank signed by the Arizona Trust Company and

Arthur A. Kline, under date of March 2, 1912, which was received and marked as Plaintiff's Exhibit "B," which instructions are as follows, to wit:

"Phoenix, Arizona, March 2d, 1912.

To the Valley Bank of Phoenix,
Gentlemen:

We herewith hand you note of the Arizona Trust Company for the sum of Five Thousand Five Hundred and Thirty Two Dollars (\$5,532.00), due on or before the first day of July, 1912, bearing interest at the rate of eight per cent (8%) per annum from date until paid, payable to Arthur A. Kline, and we also hand you notes secured by mortgages on real estate in Arizona, on which notes there is due an aggregate amount at this time, at least equal to the said sum of Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, said last mentioned notes and mortgages to be held by you in escrow as collateral security for the payment of said note of Five Thousand Five Hundred and Thirty-two (\$5,532.00) Dollars, said collateral notes and mortgages to be by you returned to the Arizona Trust Company upon the payment of said note for Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, payable to the said Kline, and if said note be not paid when due, you are hereby authorized and directed to deliver said collateral notes and mortgages to secure the same to the said Kline or to his order, for his said security, or to proceed to sell the same as such security in the manner provided by law.

It is hereby mutually agreed by and between the Arizona Trust Company and the said Arthur A.

Kline, that any of said notes and mortgages may be withdrawn from said escrow by the substitution therefor, of notes and mortgages of equal aggregate amount of the notes and mortgages so withdrawn, provided said substituted notes and mortgages shall be considered by the said Valley Bank as being of equal value of said notes and mortgages so withdrawn.

As soon as you have examined said collateral notes and mortgages and approved the same as security for said note of Five Thousand Five Hundred and Thirty Two (\$5,532.00) Dollars, you will deliver to the Arizona Trust Company, stock certificate #1260 of the Arizona Mutual Savings and Loan Association issued to Florine Kline for Forty (40) shares of Class 'A' stock of said Association, and stock certificate #1408 for [59] twenty (20) shares of the stock of said Arizona Mutual Savings and Loan Association, originally issued to A. Kaplan, and thereafter, and on the 8th day of January, 1903, assigned to Arthur A. Kline, which said certificates are also herewith handed you, and upon approving said notes and mortgages you may deliver said note for Five Thousand Five Hundred and Thirty-two (\$5,532.00) Dollars to the said Kline, and hold said notes and mortgages as security therefor.

It is hereby agreed that if, at any time on or before the 15th day of March, 1912, the Arizona Trust Company desires to take up the said note for Five Thousand Five Hundred and Thirty-two (\$5,532.00) Dollars, with a discount of ten per cent (10%) thereon, the said note, with all of the collateral notes and mortgages as security therefor, shall be returned

to the Arizona Trust Company, and the said debt cancelled upon the payment of said sum less ten per cent (10%).

IN WITNESS WHEREOF this instrument is executed in triplicate this 2nd day of March, 1912.

[Corporate Seal]

ARIZONA TRUST COMPANY.

By A. J. EDWARDS,

Vice-president,

By ALF. C. LE BARON,

Secretary.

ARTHUR A. KLINE.

Mar. 2, 1912.

Received the above papers for escrow.

THE VALLEY BANK OF PHOENIX,

LLOYD B. CHRISTY,

Cash."

The plaintiff offered a letter of The Valley Bank of Phoenix under date of March 6, 1912, to Arthur A. Kline in pursuance to the above escrow instructions contained in exhibit "B," which letter was received in evidence and marked as Plaintiff's Exhibit "C," and which is as follows, to wit:

"(Letter-head of The Valley Bank.)

Phoenix, Arizona, March 6, 1912.

Mr. Arthur A. Kline,

El Paso, Texas.

Dear Sir:

Replying to your favor of the 5th will state that we have already undertaken to find out the value of the notes that you and Mr. Edwards left here. As soon as I get that information I will then ask Mr.

Edwards to let me know how much money has been paid on each of the mortgages and I will then be able to give you the information that you want.

Yours very truly,
THE VALLEY BANK OF PHOENIX,
LLOYD B. CHRISTY,
Cashier."

Plaintiff offered a letter of the Valley Bank of Phoenix under date of April 29, 1912, which was received in evidence [60] and marked Plaintiff's Exhibit "D," which letter is as follows to wit:

"(Letter-head of The Valley Bank.)

Phoenix, Arizona, April 29, 1912.

Mr. Arthur A. Kline,
El Paso, Texas.

Dear Sir:

I am in receipt of your favor of the 27th about the note of \$5,532.00 of the Arizona Trust Company with collateral, left with us in escrow for your account.

I made inquiry as to the value of the collateral and found that it was not what you would call gilt edge, but I think it is absolutely good for the amount that it stands for.

We would not care to discount the note at this time as we have too many loans on hand ourselves.

Yours very truly,
THE VALLEY BANK OF PHOENIX,
LLOYD B. CHRISTY,
Cashier."

Plaintiff offered in evidence Note No. 119, E. E. Wardlop of Bisbee, together with the mortgage securing the same, which is one of the notes and

mortgages deposited as collateral security under the letter of instructions, together with the endorsements upon the note, which were received in evidence and marked Plaintiff's Exhibit "E," and which note is in words and figures as follows, to wit:

"Bisbee, Arizona, October 12th, 1905.

On or before the expiration of six years from the date hereof we promise to pay to the Arizona Mutual Savings & Loan Association, the sum of fifteen hundred (\$1500.00) dollars, being in repayment to said Association of a loan for that amount made to us this day, with interest thereon at the rate of six per cent per annum, payable monthly, on the first day of each and every month hereafter; said loan is made to us as members of said Association, under, and subject to the provisions of its Articles of Incorporation and its By-laws, Rules, Regulations and Resolutions all of which shall be deemed a part of this agreement to all intents and purposes as if written out in full herein, and to which we agree to conform.

We further agree to pay to said Association on the first day of each and every month during the time which this loan shall continue, the further sum of Sixteen and 50/100 (\$16.50) Dollars as premiums upon said loan; and we further agree to pay to said Association on the first day of each and every of said months, the further sum of Twenty-five and no/100 (\$25.00) dollars, being the monthly installments of the subscription price for fifty 'A' shares of the Capital Stock of the said Association, for which we have subscribed; and we further agree to pay all the fines that may be assessed against us by said [61] Asso-

ciation under its said Articles of Incorporation and By-laws, Rules, Regulations and Resolutions and in accordance with the subject to the conditions thereof.

Whenever the aggregate amount of the monthly installments of the subscription price of said stock paid hereunder and all earnings on said stock apportioned to us shall equal the amount of Five Thousand (\$5,000.00) dollars, premiums, interest and fines made and imposed by and under the By-laws of said Association then this obligation shall be deemed to be paid and satisfied, and said stock to that extent be deemed cancelled. If the then paid up value of said stock shall exceed such loan, interest, premiums, fines, costs and other additions to the debt hereby secured, then such excess shall be paid by said Association to said Theophile Wardlop and Andre Girodon, their heirs or assigns.

The payment and performance of this obligation is secured by a mortgage on real estate and is subject to the provisions contained in said mortgage.

All payments shall be made without notice or demand, at the office of said Association at Phoenix, Arizona, or to the local Treasurer of said Association at Bisbee, Arizona.

THEOPHILE WARDLOP.

EMMA GIRODON.

ANDRE GIRODON.

By EMMA GIRODON,

Atty. in Fact.

MARY WARDLOP,

By THEOPHILE WARDLOP,

Her Atty. in Fact.

[Endorsed]: No. 119. Real Estate Mortgage Note from Theophile Wardlop and Wife; Andre Girodon and Wife, Bisbee, Arizona. Amount—\$1,500.00. Dated October 12th, 1905. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company.”

(Real estate mortgages omitted by consent of parties.)

By Mr. STONEMAN.—May I ask, for the purpose of determining whether I want to make an objection, when this note was received by plaintiff in this case?

By Mr. LEWIS.—Subsequent to September 17, 1912. It was received by the Valley Bank as agent for him March 2, 1912.

By Mr. STONEMAN.—The defendant objects to the introduction of this note upon the grounds, first, that it appears from the note that the note was taken by the plaintiff after maturity. Upon the further ground that it is inadmissible for the purpose of proving or disproving any of the issues properly involved in this case; and for the additional reason that to now permit the assignee or any note given to the Arizona Mutual Savings and Loan Association, or assigned by the Arizona Mutual by a stockholder of that company, would be to prefer such stockholder to be given a preference over other stockholders in the Arizona Mutual Savings and Loan Association, or the Arizona Trust Company, both of which companies have been declared by a decree of this court to be insolvent, and the determination of the distribution of the assets is now pending on appeal. I

want to be understood as saying this; we make [62] the general objection to the introduction of all of these notes upon the ground that the one who purchases the notes of either of these trust companies,—either of the Trust Company or of the Loan Association, such notes having been given by a stockholder of either of the companies, is subrogated to the right which said stockholder had in either of the companies, and that if either of the companies became insolvent, such stockholder had the right only to participate in the assets which may be marshalled for distribution to creditors and stockholders, and cannot be permitted, by assignment of the indebtedness, to be paid in full to the exclusion of others.

By the COURT.—The evidence will be received. I will reserve my ruling. That same objection goes to all of these notes and mortgages?

By Mr. STONEMAN.—Yes, if your Honor please; excepting the Wardlop note, which is the only one past due.

By Mr. STONEMAN.—May I ask that the record show that there is no advantage taken to the fact that special objection is not made to each of these notes, and that the same objection may go to all of these notes to save repeating?

By Mr. LEWIS.—Yes, we have no objection to that course being pursued.

Plaintiff offered note of Emmett W. Booker, No. 246, together with the endorsements thereon, and the real estate mortgage securing the same, which were received in evidence and marked Plaintiff's Exhibit "F," which note is in words and figures as follows, to wit:

“\$500.00.

No. 246.

Phoenix, Arizona, April 1st, 1910.

During one hundred and three (103) months after date, without grace, for value received, I, we or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office in the city of Phoenix, Maricopa County, Arizona Territory, the sum of Five Hundred (\$500.00) Dollars, together with the further sum of Four Hundred Seventy-eight 50/100 (\$478.50) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in one [63] hundred and three (103) monthly installments of Nine and 50/100 (\$9.50) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of twenty cents (\$0.20) per month (for each installment so in default) for each and every month that any such installment shall remain unpaid as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any

monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Seventy-five (\$75.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by Emmett W. Booker, (unmarried) to the said Arizona Mutual Savings and Loan Association.

(Sgd.) EMMETT W. BOOKER."

[Endorsed]: "No. 246. Real Estate Mortgage Note, from Emmett W. Bocker (Unmarried). Amt. \$500.00. Dated April 1st, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company."

(Copy of real estate mortgage securing above note omitted by consent of counsel.)

Plaintiff offered Note No. 250, Earl E. Smith, together with the endorsements thereon, which was re-

ceived in evidence and marked as Plaintiff's Exhibit "G," said note being in words and figures as follows, to wit:

\$400.00.

No. 250.

Phoenix, Arizona, August 1st, 1910.

During One hundred three (103) months after date without grace, for value received, I, we, or either of us promise to pay to the order of Arizona Mutual Savings and Loan Association a corporation organized and existing under the laws of the Territory of Arizona and to its successors and assigns, at their office in the City of Phoenix, Maricopa County, Arizona Territory, the sum of Four Hundred (\$400.00) Dollars, together with the further sum of Three Hundred eighty-two and 80/100 (\$382.80) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said [64] principal and interest shall be paid in one hundred three (103) monthly installments of Seven and 60/100 (\$7.60) dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of fifteen cents (\$0.15) per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof

may repay one hundred dollars of the principal sum. Payments so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Seventy-five (\$75.00) Dollars, if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith made and executed by Earl E. Smith and Adelaide Smith, husband and wife, to the said Arizona Mutual Savings and Loan Association.

EARL E. SMITH.

ADELAIDE E. SMITH,

This note has been paid in full by the undersigned the present owner of the property described in a mortgage given by Earl E. Smith and Adelaide Smith to the Arizona Mutual Savings and Loan Association to secure this note, recorded in Book 69 of

mortgages, p. 558, Co. Rec. Office, Maricopa County, Arizona, and which mortgage has been satisfied of record by Sims Ely, Receiver.

ELIZABETH H. SMITH,

By ROBT. E. MORRISON,

Her Attorney.

[Endorsed]: "No. 250. Real Estate Mortgage Note from Earl E. Smith and Adelaide Smith, husband and wife, Amt. \$400.00. Dated August 1st, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company."

(The real estate mortgage securing the above note is omitted by consent of counsel.)

Plaintiff offered Note No. 253 of Oscar W. Jennings and Emma B. Jennings his wife, together with the endorsements thereon and the real estate mortgage securing the same, which were received in evidence and marked as Plaintiff's Exhibit "H" which note is in words and figures following, to wit: [65]

"\$800.00

No. 253.

Phoenix, Arizona, September, 1st, 1910.

During one hundred and three (103) months after date, without grace, for value received, I, we or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns, at their office in the City of Phoenix, Maricopa County, Territory of Arizona, the sum of Eight Hundred (\$800.00) Dollars together with the further sum of Seven Hundred Sixty Five & 60/100 (\$765.60) Dollars interest on said principal sum for

and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in one hundred and three (103) monthly installments of fifteen and 20/100 (\$15.20) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of Thirty cents (\$.30) per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of Eighty (\$80.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof, that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith, made and executed by Oscar W. Jennings and Emma B. Jennings, husband and wife, to the said Arizona Mutual Savings and Loan Association.

OSCAR W. JENNINGS,
EMMA B. JENNINGS.”

[Endorsed]: “No. 253. Real Estate Mortgage Note, from Oscar W. Jennings and Emma B. Jennings his Wife. Amt. \$800.00. Dated September 1st, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen. Arizona Trust Company.”

(Copy of real estate mortgage securing the foregoing note is omitted by consent of counsel.)

Plaintiff offered Note No. 258 of Thos. G. Alger and Sarah P. Alger, his wife, together with the endorsements thereon and the mortgage securing the same, which were received in evidence and marked Plaintiff's Exhibit “I,” and a copy of which [66] note is as follows:

“\$600.00.

No. 258.

Phoenix, Arizona, October 1st, 1910.

During one hundred and three (103) months after date, without grace, for value received, I, we or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns,

at their office in the City of Phoenix, Maricopa County, Arizona Territory, the sum of Six Hundred (\$600.00) Dollars, together with the further sum of Five Hundred seventy-four & 20/100 (\$574.20) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in one hundred and three (103) monthly installments of eleven & 40/100 (\$11.40) Dollars each, payable on or before the 1st day of each and every month hereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable the makers agree to pay the sum of Twenty-five cents (\$0.25) per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment, if any monthly installment, principal or interest, required by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when

due, all costs of collection and an attorney's fee of Seventy-five (\$75.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit, shall be paid to the holder in addition to the amount due and owing hereon. .

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith made and executed by Thomas G. Alger and Sarah P. Alger, husband and wife, to the said Arizona Mutual Savings and Loan Association.

THOMAS G. ALGER,
SARAH P. ALGER.

Witness:

J. T. Owen."

[Endorsed] : "No. 258. Real Estate Mortgage Note from Thomas P. Alger and Sarah P. Alger. Amt. \$600.00. Dated October 1st, 1910. Arizona Mutual Savings & Loan Association, by J. L. Olsen, Secy. Arizona Trust Company."

(Copy of mortgage securing above note is omitted by consent of counsel.) [67]

Plaintiff offered Note No. 261 of the Phoenix Construction and Supply Company, together with the endorsements thereon and the mortgage securing the same, which were admitted in evidence and marked as Plaintiff's exhibit "J," which note is in words and figures as follows, to wit:

“\$2000.00.

No. 261.

Phoenix, Arizona, November 25th, 1910.

During one hundred and three (103) months after date, without grace, for value received, I, we or either of us, promise to pay to the order of Arizona Mutual Savings and Loan Association, a corporation organized and existing under the laws of the Territory of Arizona, and to its successors and assigns at their office in the City of Phoenix, Maricopa County, Arizona Territory, the sum of Two Thousand (\$2,000.00) Dollars, together with the further sum of Nineteen Hundred & Fourteen (\$1914.00) Dollars interest on said principal sum for and during said term. It is hereby agreed by the makers hereof that said principal and interest shall be paid in one hundred & three (103) monthly installments of Thirty-eight (\$38.00) Dollars each, payable on or before the 1st day of each and every month thereafter until said principal and interest shall be fully paid, and in default of payment of any monthly installment (principal and interest) when the same shall be due and payable, the makers agree to pay the sum of eighty cents (\$0.80) Dollars per month (for each installment so in default) for each and every month that any such installment shall remain unpaid, as interest upon such delinquent installments.

At any time after twelve regular monthly payments have been made and at the expiration of any period of six months thereafter the maker hereof may repay one hundred dollars of the principal sum. Payment so made will reduce all succeeding monthly payments in proportion to such payment. If any monthly installment, principal or interest, required

by this note shall remain unpaid for ten days after the same becomes due and payable, then the whole principal sum together with all monthly installments remaining unpaid as evidenced hereby may at once, without notice, become due and payable, at the option of the holder hereof.

If any payment required hereby is not paid when due, all costs of collection and an attorney's fee of One Hundred & Fifty (\$150.00) Dollars if collected by an attorney, foreclosure proceedings, sale or suit shall be paid to the holder in addition to the amount due and owing hereon.

It is hereby agreed by and between the makers, payee, endorsers, endorsees and holders hereof that this note is fully negotiable and that presentment and demand for payment, protest and notice of protest are hereby expressly waived.

This note is secured by a mortgage of even date herewith made and executed by Phoenix Construction & Supply Company(a corporation) to the said Arizona Mutual Savings and Loan Association.

[Corporate Seal]

PHOENIX CONSTRUCTION AND SUPPLY COMPANY.

By N. R. CHRISTMAN,
Vice-president.

E. B. ZACHRY,
Treasurer.

Attest:

E. B. ZACHRY,
Secretary.

[Endorsed]: "No. 261. Real Estate Mortgage Note from Phoenix Construction and Supply Co. (a

Corp.). Amt. \$2,000.00. Dated November 25th, 1910. Arizona Mutual Savings & Loan Association. By J. L. Olsen, Secy. Arizona Trust Company.

(Copy of Mortgage omitted by consent of counsel.)
[68]

By Mr. LEWIS.—Mr. Stoneman, will you admit the fact that the stock No. 1250 of the Arizona Mutual Savings and Loan Association issued to Florine Kline for 40 shares of Class “A” stock of said Association and stock certificate No. 1408 for 20 shares of stock of the Arizona Mutual, originally issued to A. Kaplin, and thereafter on the 8th day of January, 1913, assigned to A. A. Kline, which certificates are described in the letter of instructions to the Valley Bank introduced as exhibit “B” were delivered to the Arizona Trust Company?

By Mr. STONEMAN.—Yes, that is admitted.

**[Testimony of Arthur A. Kline, the Complainant, in
His Own Behalf.]**

ARTHUR A. KLINE was thereupon called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination by Mr. LEWIS.

My name is A. A. Kline. I reside at El Paso, Texas. I am the plaintiff in this action.

Letter from Arizona Mutual Savings & Loan Association dated July 17, 1911, received by Mr. Kline from said Association offered and received in evidence as Plaintiff's Exhibit “K,” which letter is as follows, to wit:

“(Letter-head Arizona Mutual Savings & Loan Association.)

Phoenix, Arizona, June 17th, 1911.

Mr. A. A. Kline,
El Paso, Texas.

Dear Sir:

Replying to your favor of June 7th which should have been answered earlier but for the fact that I have been so busy since elected to the office of Secretary less than a month ago, on account of the former Secretary being called East owing to illness in the family and without sufficient time to explain everything in the office to me, beg to say that if some officer of the association ever informed you or anyone else that Class “A” stock held by you is withdrawable or matured at this time, it was evidently under a misapprehension of the [69] facts.

An examination of the stock account of Mrs. Florine Kline indicates that it will mature about the first of January and probably be worth a little more than par and your twenty shares would be so nearly matured that the stockholders’ meeting might vote to permit its withdrawal, if you desire to do so.

The value at the present time of Certificate #1408 is \$1647.99. The value of Certificate #1260 is \$3,674.02, but they are not withdrawable at present, However, any payments that are made in the future, will be credited and the earnings of the same, of course, credited, and if it amounts to more than par at the time the dividends credits causes maturity, you will be paid the excess just the same.

Hoping you will find this satisfactory, and assur-

ing you of our best endeavors in the matter for the benefit of all stockholders, we beg to remain,

Yours very truly,

ARIZONA MUTUAL SAVINGS & LOAN
ASSN.

LEROY H. CIVILLE,
Secretary.

Dict. FGK."

By the COURT.—Had the stock matured at that time?

By Mr. LEWIS.—That is the purport of the letter, that it would mature at that time, January, 1912. It was simply explanatory of how Mr. Kline came to Phoenix.

By the COURT.—I understand. In the meantime did the association become insolvent?

By Mr. LEWIS.—No. If your Honor please.

Letter from the Arizona Mutual Savings & Loan Association dated July 12, 1911, offered and received in evidence and marked Plaintiff's Exhibit "L," which letter is as follows, to wit:

“(Letter-head Arizona Mutual Savings & Loan
Association.)

Phoenix, Arizona, July 12, 1911.

Mr. Arthur A. Kline,
El Paso, Texas.

Dear Sir:

Replying to your favor of the 3rd inst. would say that our records show that you have made payments including the month of June. Any notice that was sent you must have been an error, caused by the fact that we have been so busy in the office recently

that we have been unable to keep up with the work properly.

Referring to your letter of June 19th and your mention of the same in your letter of July 3rd, would say that the writer was new in the office at the time that letter was received and desired to consult with some of the other officers who were out of town at the time. The letter was mislaid, hence the delay in answering.

You ask whether advance payments could be made on Certificates #1260 and #1408, and in reply have to say that I am advised that this cannot be done. The advance payments, of course, could be made and when the annual meeting is held in January [70] and dividends are portioned, the payments will draw their proportion of dividends and enhance the value of your stock, but, at the same time, you can understand that paying in money at this time and withdrawing it immediately would be of no service to the association, and it would be simply a matter of bookkeeping to withdraw stock which is not at present withdrawable. No officer of the company would have any authority to make any change in the situation. There will be no trouble, however, about your getting the money on these certificates in January, but I see no way of getting it before that time.

I regret that we have delayed answering your

(Testimony of Arthur A. Kline.)

letter and trust it has not caused you any inconvenience.

Yours very truly,

ARIZONA MUTUAL SAVINGS & LOAN
ASSOCIATION.

LEROY H. CIVILLE,

Secretary.

Dict.

A. J. E./GLF.”

(Letter introduced in evidence and marked as Plaintiff's Exhibit “L.”)

By Mr. LEWIS.—This letter is of the same general purport.

Q. Mr. Kline, I show you what purports to be a circular issued by the Arizona Trust Company; did you receive that circular from the Arizona Trust Company?

A. No, sir. I received that circular from Mr. Le Baron, who was in El Paso.

Q. Who was he?

A. He was the secretary of the Arizona Trust Company.

By Mr. STONEMAN.—I would like to know what the purpose of the introduction of this circular is.

By Mr. LEWIS.—The purpose of it is this, if your Honor please: A possible phase of this case is the good faith of this man in dealing with this company without any knowledge of it being in an insolvent condition. The circular which I am now offering to introduce is a circular of the company, and states the officers of the company and who they are, and contains various matters concerning the good stand-

(Testimony of Arthur A. Kline.)

ing of the company, and purports to have been issued along about the last of 1911. What time did you receive it, Mr. Kline?

A. Sometime in October.

Q. October, 1911? A. Yes, sir, 1911.

By Mr. LEWIS.—That would be then about six months before the time he sold this stock to the Arizona Trust Company. It has to my mind some weight upon the question of his duty to make further inquiry in regard to the solvency of the company, in regard to their condition, in regard to their right to make such transactions at the time he sold his stock to the Arizona Trust Company.

By the COURT.—Suppose he acted in good faith, would he not [71] be required to adjust his business with them on that basis. Was he not a stockholder?

By Mr. LEWIS.—He was not a stockholder of the Arizona Trust Company, and never was a stockholder of that company.

By the COURT.—I don't mean the Arizona Trust Company.

By Mr. LEWIS.—That is the company I have in mind and that is the circular I am offering.

By Mr. STONEMAN.—We object to the introduction of this circular, your Honor, in that as a stockholder in the Arizona Mutual, the plaintiff has no right to rely on statements made by any person except the proper officers of Mutual Loan Association, and further, that it was his duty as a stockholder to obtain from the records of the Association information concerning the solvency or insolvency

(Testimony of Arthur A. Kline.)

of the Association, and for that reason, it is immaterial for the purpose of proving any of the issues of this case.

By Mr. LEWIS.—I think it only one of those straws to which your Honor—

By the COURT.—I sustain the objection and allow you to introduce the testimony under Equity Rule 46.

Circular excluded and marked as Plaintiff's Exhibit "M."

By Mr. LEWIS.—I make no exception to the ruling. I hand you what purports to be a financial statement of the Arizona Mutual Savings & Loan Association, as of date December 31, 1910, and ask you when you received that.

A. I received that by mail.

Q. About when?

A. I think sometime in February.

Q. February, 1911?

A. February, 1911, somewheres along there.

By Mr. STONEMAN.—We object to the introduction of this testimony for any purpose if it is introduced for the purpose of showing the condition of the solvency of the Arizona Mutual Savings & Loan Association in any matters concerning the issues in this case. It is a circular showing the financial standing of the Arizona Mutual in 1910. On the further ground that it is incompetent, irrelevant and immaterial.

By Mr. LEWIS.—We are offering for the same purpose that we offered the last circular, for the purpose of showing what information was at the hands

(Testimony of Arthur A. Kline.)

of this man and what he had in mind when he dealt with the Arizona Mutual as he did deal.

By Mr. STONEMAN.—I have no objection to make on that ground except what I made to the circular preceding this offer, that it cannot in any way bind the Arizona Mutual Savings & Loan Association, nor is the recipient of such a circular entitled to rely upon the contents of it without going to the records themselves. [72]

By the COURT.—The ruling will be the same as on the question immediately preceding this one.

Circular excluded and marked as Plaintiff's Exhibit "N."

Mr. Kline then continued his testimony in direct examination as follows:

I went to Phoenix to see about the collection of the stock certificates of Florine Kline and my own stock certificate the latter part of February, 1912. I went to the office of the Mutual Savings & Loan Association and saw Mr. Olsen, the secretary. I told him that the reason for my coming was because I had received a letter from him saying that on account of the mismanagement of some of the officers the stock would not mature as soon as they thought it would. I asked him if I could see into the books, and he showed them to me. I am a bookkeeper and accountant and I looked over the stock-book. I did not look over any other books. I made inquiry from Mr. Olsen in regard to the financial condition of the Arizona Mutual Savings & Loan Association and he referred me to Mr. Edwards, who was the manager, and, as Mr. Olsen told me, either president or

(Testimony of Arthur A. Kline.)

vice-president of the loan association that year.

I saw Mr. Edwards that afternoon and talked with him in regard to the financial condition of the company. He said the company was in first-class condition, particularly after the examiner had examined it and thrown out some of the loans, which was the actual cause of my stock not maturing in January. I had a talk with him in regard to the payment for my stock and told him I was hard pressed for money and that I would like to get my money if possible. He said: "Can't tell you what I can do for you now, but I will see what can be done." I didn't see him any more that day. I had a letter to Mr. Christy of the [73] Valley Bank and I spoke to Mr. Christy about the Mutual Savings and Loan Association several times and he said that the Mutual was all right and had been examined by the bank examiner and said: "You will get your money in a short time." The next day I went to see Mr. Christy in the morning. I think it was March 1st, and there I met Mr. Tracy, who was the bank examiner who examined the Mutual Loan Association. He said he examined the association. I asked him what the condition of the association was. Mr. Tracy said: "It is absolutely solvent. It is worth dollar for dollar absolutely." Then I asked Mr. Christy whether he would not buy my stock or give me discount, and he said: "Well, you come around to-morrow and I will see what I can do." On the second, in the morning, he told me: "You go and see Mr. Edwards and I think you can fix it up." I went to see Mr. Edwards and I told him

(Testimony of Arthur A. Kline.)

how much I would pay in order to make it mature. He said that I couldn't do that, but that he would buy my stock. Mr LeBaron was to see me last October—I says, “I do not care to take any of the stock of the Trust Company; it is a new company; it seems pretty good, but I will not sell my stock to you.” He said: “I will take it from you, I will pay you what it's worth on the books of the company and give you a four months note with the privilege of paying cash, for which you allow me ten per cent should I pay you the cash within two weeks.” He said he would give me securities which were good. I asked him: “Are they yours?” and he said, “They are.” I said: “I will accept the offer, provided you leave the securities at the Valley Bank and if Mr. Christy finds that the securities are good I will turn over my stock to you in exchange for the note and the security. Then he wrote up an agreement. It was then late in the afternoon. Mr. Christy was not at the bank, but we finally found him and he gave us a receipt and took these securities. I don't think I asked any of the officers of the Arizona Mutual as to whether [74] the Trust Company owned these notes and mortgages which were put up as collateral security. Mr. Le Baron was present when the arrangement was made. I asked Mr. Edwards and Mr. LeBaron in regard to the securities.

Q. What did Mr. Edwards and Mr. Olsen tell you as to these securities that were introduced here as collateral security.

(Testimony of Arthur A. Kline.)

By Mr. STONEMAN.—We object to that, your Honor.

By Mr. LEWIS.—It is for the purpose of prohibiting the Arizona Building & Loan Association from claiming title to those notes and mortgages. In other words, even though Edwards was an officer of both companies, and even though Olsen was but the secretary of the Arizona Mutual, when this man asked them as to whether the Trust Company had the actual title, they having the apparent title, that the representations made by the officers of that company with reference to the actual state of the title is an element the Court should take into consideration in determining the issues in this case. There was none for him to go to, but the officers of this company. It seems to me that he pursued the duty of inquiry as far as any Court could insist that he go. He could not go any further than the officers of the company. There was no duty upon his part to go any further. They were the persons who were charged with the duty of making a claim for the Arizona Mutual if a claim existed, and if they made any claim to them, it seems to me that this man is relieved from any further inquiry, and the Arizona Mutual Savings and Loan Association is estopped by the representations of these officers.

By the COURT.—Made to one of their own shareholders?

By Mr. LEWIS.—It makes no difference whether made to one of their own shareholders or note. The shareholder cannot determine the question of

(Testimony of Arthur A. Kline.)

title by any method that I can conceive of except by going to the people who actually know in regard to the situation and asking about it. A shareholder in a company is not bound by a constructive knowledge of what actually exists, and there was, so far as now appears in this case, there was no record which would have imparted any different knowledge than what this man is seeking to testify to, namely, that the officers of the company told him that they belonged to the Arizona Trust Company. Until something to the contrary is shown, it seems to me that the evidence is at least *prima facie* sufficient to bind the company.

By the COURT.—We will let the witness answer the question; I will reserve my ruling on the evidence.

By Mr. STONEMAN.—If your Honor please, we urge as an additional ground to the objection that the Arizona Mutual should not be bound by these representations.

By Mr. LEWIS.—I understand that the Court will receive the evidence and reserve his ruling.
[75]

By the COURT.—Yes. Read the question, Mr. Reporter.

(Question read.)

WITNESS. (Resumes:)

They told me it was their property and that they owned it; that they had a right to do with it as they pleased; that they had acquired it by having about eighty or eighty-five per cent of

(Testimony of Arthur A. Kline.)

the original stock of the Mutual which they acquired by buying or by giving shares in the Arizona Trust Company for shares in the Mutual. They did not say anything else to me about these notes. I asked them whether the security they were going to give me to guarantee that note of \$5,532.00 was their own security. They said, Yes, they owned them; it was their own property and they could do with them as they pleased. It was Mr. Le Baron and Mr. Edwards who made that remark; not Mr. Olsen; they are the ones I had the transaction with. When I spoke about the mutual regarding its solvency, I spoke to Olsen and Edwards; Olsen was not present when I was talking to Le Baron and Edwards, nor was he present when I asked him in regard to who owned the notes. Le Baron and Edwards were present. I asked them whether they owned the securities they were going to give me for security for that note and they said they owned it and could do with it as they pleased and that they would not give me anything they didn't own.

By Mr. STONEMAN.—We move that the answer be stricken out, that it is immaterial in that the Arizona Mutual could not be bound by the statement as to the ownership of these notes made by either Edwards, Olsen or Le Baron.

By the COURT.—What do you say as to that?

By Mr. LEWIS.—If he was inquiring from Edwards as as officer of the Arizona Trust Company, I think Mr. Stoneman's contention is correct. In that event, the only force that this evidence would

(Testimony of Arthur A. Kline.)

have would be to show the state of this man's mind at the time he made this transaction.

By the COURT.—I sustain the objection.

By Mr. LEWIS.—Even though we offer it for the sole purpose of showing that he did make inquiry from the Trust [76] officers with reference to the ownership of the notes at that time.

By the COURT.—If you offer it solely for that purpose, I will admit it.

By Mr. LEWIS.—That is the limitation on the offer at the present time.

By the COURT.—The answer may stand with the rulings intervening as they now appear.

By Mr. STONEMAN.—If your Honor please, do I understand from the statement just made, that the only judgment that is desired is to run against the Arizona Trust Company.

By Mr. LEWIS.—The deficiency judgment is against the Arizona Trust Company.

By the COURT.—If the decree of February 12, 1913, stands, why there would not be anything in the Arizona Mutual in the treasury.

By Mr. STONEMAN.—No, sir.

By Mr. LEWIS.—I will tell your Honor frankly that I have lost track of those decrees; I really do not know but my theory in regard to this note is this, that Mr. Kline is entitled to the foreclosure of this collateral and the sale of it, if the receiver does not see fit to pay it off. If that does not satisfy, he holds a personal judgment against the Arizona Trust Company, they having been the makers of the note, and

(Testimony of Arthur A. Kline.)

if there is anything that the Arizona Trust Company has got that would be applicable to that deficiency judgment, then he could get it.

By the COURT.—In other words, the debt of the Arizona Trust Company, under the decree of February 12, 1912, should be paid before the stockholders of the Mutual get anything.

By Mr. LEWIS.—If that be so, Mr. Koine stands better than the stockholders in the old Mutual.

By Mr. STONEMAN.—Whereas, on the other hand, under the decree of March, 1914, Mr. Kline is directed to hand his claim to the Master in Chancery.

Cross-examination by Mr. STONEMAN.

When I first came up to Phoenix to talk this matter over I came up to see where the difficulties were in regard to the value of shares in the Arizona Mutual. I didn't know anything about the Arizona Trust Company at that time. I had heard during [77] the latter part of 1911 that A. J. Edwards and Le Baron were contemplating the merging of the assets of the Arizona Mutual Savings & Loan Association with the Arizona Trust Company.

Mr. Le Baron came to see me in El Paso with the idea of seeing whether I would exchange my shares in the Arizona Mutual for the same amount of shares in the Arizona Trust Company. I told him that I did not want to change my shares and he assured me that I would get my shares about the first of January and they told me that it had not matured.

(Testimony of Arthur A. Kline.)

Then I came to Phoenix myself and saw them. They did not pay the stock and I made inquiries and discovered that the examiner had withdrawn and thrown out a certain amount of loans that they had made and that had reduced the value of all the stock so that it had not matured.

Q. Didn't you just testify that some officers of the Arizona Mutual told you that because of the State Auditor's directing that certain securities should be stricked from the assets because they were not good securities that they were unable to pay matured stock at its maturity?

They could pay up to the value of the stock according to the value on the books. I came here with the idea of getting the cash payment for my stock at its matured value, but Mr. Olsen told me that it had not matured. It was only worth \$5,532.00 instead of \$6,000.00. I did not wait until it matured. I sold it right there and then. I did not know whether the loan association had the money to pay it or not. They said they couldn't according to their by-laws, declare the stock matured until it was matured.

I said the reason it did not mature was because the bank examiner took out certain loans.

I did not ask whether the Arizona Mutual had money in its treasury to pay off matured stock at its maturity. What I wanted to know was whether my stock had matured so I could [78] get my money.

I already testified exactly what the officer told me. That the bank examiner threw out certain loans

(Testimony of Arthur A. Kline.)

which reduced the value of the stockholders' stock. I made no other inquiry as to the financial condition of the Arizona Mutual except of Mr. Christy, who claimed he was a stockholder of the Mutual. I am a bookkeeper. I only went to the books to which I could get access to. I did not ask to see the ledger and account-books. I only asked to see the stock-books to see who the stockholders were. I had no talk with Edwards about his plan to secure stock of the Arizona Mutual for the Arizona Trust Company. When Mr. Le Baron was in El Paso he told me that he wanted to exchange my stock.

I stayed in Phoenix one day on my second visit. On my first visit I was here three days. The second time I was here in August. I heard some comment on the affairs of the company. Mr. Smith, who was in charge of the Arizona Trust Company at that time told me that there was talk about an action against the Arizona Trust Company and the Arizona Mutual Savings & Loan Association. That talk was in August. I sold my stock and took the note from the Arizona Trust Company on March second. Everything was completed in March. Mr. Smith told me in August that there were sufficient assets at that time to pay everybody.

Q. As a matter of fact, didn't the bank as your agent exchange the stock for the note under the authority and instructions given to the bank by you?

A. Yes, sir.

Q. That was in August?

A. No, sir, I don't know when it was. I wrote them

(Testimony of Arthur A. Kline.)

in the month of July about the payment of that note.

The reason that I took the note of the Trust Company with collateral instead of waiting for the stock to mature was that I was hard up for money and I thought I would be able [79] to discount the note. Mr. Edwards said himself that he would be likely to take up the note at a ten per cent discount. Edwards said when he told me that he would give me security for this note; that he had the right to do that. I relied on his statement. I made no inquiry of any other person at that time whether or not Edwards or the Arizona Trust Company could buy the stock of the Arizona Mutual. I knew that Edwards was a member of the Arizona Mutual and I knew at the time I was dealing with him that Edwards was also an officer of the Arizona Trust Company. Edwards led me to believe that he assumed the right as an officer of the Trust Company to say that the Arizona Mutual, in which company he also was an officer, would sell its stock to the Arizona Trust Company. I did not know at the time of my transaction with Edwards that the affairs of the Trust Company were being conducted by the same board of directors that were conducting the affairs of the Arizona Mutual. I only knew that one man was a director in both companies, and that was Mr. Edwards.

I had heard nothing in regard to the affairs of the Arizona Mutual being in bad shape. On the contrary, Mr. Christy told me that the Arizona Mutual

(Testimony of Arthur A. Kline.)

was in perfect condition. I found out since that Mr. Christy was mistaken when I heard there was a lawsuit against the Mutual in September, 1912, when someone sent me a slip to come to court.

I had a talk with Mr. Tracy about a minute or two about the affairs of the company in Mr. Christy's office at the Valley Bank and I asked him what the standing of the company was. He said, "Perfectly safe and sound as a dollar for the amount which it stands for. Of course, I had to reduce the loans."

The collateral for the note which the Arizona Trust Company [80] gave me was sent me by the bank some time in July or August, 1912. The securities were delivered to the bank March 2, 1912.

By the COURT.—Do you know that of your own knowledge?

A. We took them there ourselves, Mr. Edwards and myself, and I got a receipt from Mr. Christy for them.

By Mr. STONEMAN.—Were the securities turned over and attached to that note before the Valley Bank through Mr. Christy had approved of their value? A. How is that?

Q. The securities were not turned over before they had examined them? A. Yes, sir.

By Mr. LEWIS.—Did you understand that question? Read the question, Mr. Reporter.

(Question read.)

A. Yse, sir, they were turned over at the same time.

By the COURT.—I thought you said the securities were to be turned over to the bank and delivered

(Testimony of Arthur A. Kline.)

to the bank for your account after Mr. Christy had passed on them?

A. No, sir; the securities were to be delivered to Mr. Christy and he was to investigate them before he gave over my stock, and if they were all right he was to deliver the stock. My certificates were delivered to the bank at the same time; I have a letter from the bank approving the securities, dated some time in April, 1912. I wrote them then about discounting the note and I wrote them to keep the note and the papers there and to collect the note when it became due. Here is his letter of July 11th, in which he writes me that they did not pay the note and a short time afterwards I wrote him to send me all the papers. I was led by Mr. Christy to believe that the collateral notes were absolutely good security. I was willing to settle on a cash basis at a reduction of ten per cent for I was hard up and needed the money. [81]

Redirect Examination by Mr. LEWIS.

The first time I came to Phoenix was February 28th or 29th, 1912, and I stayed here continuously until this transaction was completed. I came back to Phoenix in August or September, 1912.

Mr. Balke wrote me a letter saying that Mr. W. T. Smith had taken charge of the Arizona Trust Company and that Smith told him to write me that everything would be all right and I would get my money dollar for dollar. Then I wrote Mr. Smith a letter and he sent me a letter in which he said the same thing. I was going to California in August, and I

(Testimony of Arthur A. Kline.)

stopped over one day and I saw Mr. Smith and spoke to him about my note, and he said: "You will get every dollar of the money. I will pay you the interest now. I can't pay it myself now, because I have to see my associates." I told him I did not like to wait long and he promised to pay me \$1,500 or \$2,000 within a few days and then I went on to California. I wrote or telegraphed Mr. Christy from San Francisco and he telegraphed me that Mr. Smith had not made the payment.

Witness excused. [82]

By Mr. LEWIS.—It has been agreed between counsel that the escrow envelope and the papers as they actually existed in escrow shall be received in evidence as a part of plaintiff's case and it shall also appear that this escrow envelope with the papers enclosed came from the Valley Bank and had been in the Valley Bank's possession ever since.

Escrow envelope with papers enclosed received in evidence and marked Exhibit "O" as follows:

"No.508.

NOTE AND COLLATERAL NOTES IN ESCROW.

From Arthur A. Kline, El Paso, (hereinafter called the first party), to Arizona Trust Company (hereinafter called the second party).

Total consideration \$5532 and Int.

TO THE VALLEY BANK

Phoenix, Arizona.

This envelope is deposited with you in Escrow, subject only to the following instructions:

The within papers are to be delivered to the above-designated second party, its order or assigns, upon demand, if said second party, its agents or assigns, shall deposit with you for the credit and use of the above designated first party, the full amount of the total consideration hereinabove written; the time and terms of payment being as follows, to-wit: 1st payment to be made on or before 7—1 1912 \$5532.00 with interest at 8% from 3/2—12.

But if said payments or any of them are not made at the times and in the amounts hereinabove stated, you will accept no further payments and deliver enclosed papers to ———, or order, on demand, time being of the essence of these instructions.

You are hereby released from any and all liability and claim or claims whatsoever in connection with receiving, retaining and delivering the same, except that in case any payment is made hereon, as above stated, you will credit as per above instructions, less your charge of \$1.00 per \$1000 of the amounts so paid, together with the amount, if any, paid by you for legal expenses connected herewith, which amount you are hereby authorizd to deduct and hold out.

These charges, in addition to the charge for filing and indexing required at the time papers are deposited, being the minimum as fixed by the Associated Banks of Phoenix.

Filed and indexed Mar. 16, 1912.

Papers enclosed sent Mr. Kline via mail by Cashier 9—; 7—12.”

(Enclosed in the above-mentioned envelope were Certificate #1260 for 40 shares issued to Florine Kline dated August 1, 1900, and certificate #1408, for 20 shares issued to A. Kaplan, April 1, 1901 and transferred to Arthur A. Kline, El Paso, and approved by the Company January 8, 1903, together with original of instructions to Valley Bank Exhibit “B,” above.)

(There are no Plaintiff’s Exhibits “M” and “N” in the record.) [83]

Plaintiff rests his case.

By Mr. STONEMAN.—We think, as has been developed in this hearing this afternoon, that the facts as far as they can be, are pretty well admitted and agreed to. We have no evidence which I could submit which would aid the Court in any way upon the facts in the case, and therefore are not submitting any evidence because of an agreement with Mr. Lewis that the defendants were not to be called upon to submit certified copies of the two decrees pled in the answer which Mr. Lewis and I have agreed contain the facts so far as they are referred to in the answer. Is that true, Mr. Lewis?

By Mr. LEWIS.—That is correct. We make no objection to the form of the proof. We do object to the competency and relevancy of the judgments themselves upon the ground that we were not parties to this litigation and that our interest, if any we had, initiated prior to the institution of that suit, and therefore we are not barred by any decree which

may have been rendered in the Clark litigation.

By Mr. STONEMAN.—With that exception, it may be stipulated then that we will use in this suit the two decrees as they appear in the records in this court?

By Mr. LEWIS.—That is correct.

Decrees as pled received, subject to the objection. Which objection was later and upon the 4th day of October, 1915, overruled and the exception of the plaintiff to the ruling of the Court admitting said decrees was then and there duly entered of record.
[84]

That said decrees as pled in said answer and received in evidence are as follows:

[Decree as Pled in Answer.]

“That heretofore, to wit, on the 27th day of February, 1913, by a decree of the above-entitled court duly made and entered in the case of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, and The Arizona Trust Company, it was found and determined that at the time of the attempted transfer by the Arizona Mutual Savings and Loan Association to The Arizona Trust Company of the assets of said The Arizona Mutual Savings and Loan Association, including the assets involved in this action, The Arizona Trust Company, defendant herein, had no right, power or authority to receive from said The Arizona Mutual Savings and Loan Association, any of said assets and that said attempted transfer was for the reasons set forth in said decree, void and of no effect.

That subsequent to the rendition of said decree by an order and modification thereof, duly made and entered in the above-entitled court, on the 12th day of March, 1914, in said action wherein said Charles W. Clark is complainant and The Arizona Mutual Savings and Loan Association, and the Arizona Trust Company are defendants, it was further ordered, adjudged and decreed that said attempted transfer of said assets was and is void, and in accordance with the terms of both of said decrees, the Receiver was directed to receive and report to the Master in Chancery of this Court, all claims against either said The Arizona Mutual Savings and Loan Association or the Arizona Trust Company, whether said claims should arise through claim as creditor or should arise through claim as stockholder or either of said companies."

Statement of the evidence in the above-entitled cause prepared by complainant and appellant, as corrected under the direction of the Court.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. L. MORGAN,

Solicitors for Complainant and Appellant.

Solicitors' address: 312 Nat'l Bank of Ariz. Bldg.,
Phoenix, Arizona. [85]

The foregoing statement of the evidence being corrected in accordance with the direction of the Judge of the above-named Court upon the suggestions and objections of the appellees, is hereby accepted as a

correct statement of the evidence.

Dated at Phoenix, Arizona, November 24, 1915.

GEORGE J. STONEMAN,

Solicitor for Appellees.

[Order Approving Statement of Evidence.]

The foregoing statement of the evidence in the above-entitled cause being corrected in accordance with the orders of this Court, is hereby approved and it is ordered filed in the clerk's office as a part of the record in said cause for the purposes of the appeal herein.

Dated November 26th, 1915.

WM. H. SAWTELLE,

Judge. [86]

[Endorsed]: In the District Court of the United States for the District of Arizona. Arthur A. Kline, Complainant and Appellant, vs. The Arizona Mutual Savings and Loan Association, a corporation, et al., Defendants and Appellees. In Equity—No. E-25 (Phoenix). Statement of the Evidence as Corrected.

[Endorsed]: No. 2692. United States Circuit Court of Appeals for the Ninth Circuit. Arthur A. Kline, Appellant, vs. The Arizona Mutual Savings and Loan Association, a Corporation, The Arizona Trust Company, a Corporation, and Sims Ely, as Receiver of the Arizona Mutual Savings and Loan Association and as Receiver of the Arizona Trust Company, Appellees. Transcript of Record. Upon

Appeal from the United States District Court for the
District of Arizona.

Received November 29, 1915.

F. D. MONCKTON,
Clerk.

Filed December 1, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2692

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

**THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation, THE ARIZONA
TRUST COMPANY, a Corporation, and SIMS
ELY, as Receiver of the Arizona Mutual Savings
and Loan Association and as Receiver of the Ari-
zona Trust Company,**

Appellees.

Brief of Appellant.

**Upon Appeal from the United States District Court for the
District of Arizona.**

**THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,**

Attorneys for Appellant,

Phoenix, Arizona.

Bower Co., Phoenix

FEB 2 - 1916

F. D. Monckton,

In the United States
Circuit Court of Appeals

For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation, THE ARIZONA
TRUST COMPANY, a Corporation, and SIMS
ELY, as Receiver of the Arizona Mutual Savings
and Loan Association and as Receiver of the Ari-
zona Trust Company,

Appellees.

Brief of Appellant.

**Upon Appeal from the United States District Court for the
District of Arizona.**

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Attorneys for Appellant,
Phoenix, Arizona.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation, THE ARIZONA
TRUST COMPANY, a Corporation, and SIMS
ELY, as Receiver of the Arizona Mutual Savings
and Loan Association and as Receiver of the Ari-
zona Trust Company,

Appellees.

— — — — —

STATEMENT OF FACTS.

Arthur A. Kline, the plaintiff and appellant, was, prior to March, 1912, the owner of certain stock in the Arizona Mutual Building and Loan Association. This stock had been represented to him as maturing in January, 1912, (Transcript, p. 85). Not being able to collect the matured value he came to Phoenix, the office of the Loan Association, and there interviewed its officers. He was told that the reason his stock had not matured was that upon an investigation of its affairs by the state bank examiner certain loans were ordered written off, which reduced the dividends and prevented his stock from maturing. (Transcript, p. 98). Mr. Edwards, an officer of the Loan Company, told him that the Arizona Trust Company, of which he was also an officer and which company had been and was trying to acquire the stock of the Loan Association, might purchase

his stock, and an agreement was reached whereby the Trust Company bought the Kline stock for \$5,532.00, its then book value, giving in payment its four months note secured by the collateral negotiable promissory notes and mortgages, all but one of which were unmatured, now claimed by the defendant and appellee the receiver of the Loan Association. (Transcript, pp. 90-92). The Kline stock, Trust Company note and collateral was upon March 1, 1912, placed in escrow with the Valley Bank of Phoenix under the further agreement that its cashier, Mr. Christy, should investigate the value of the collateral and if he approved it the stock should be delivered to the Trust Company and the note and collateral to Mr. Kline (Transcript, pp. 64-66). Mr. Christy approved the collateral April 29, 1912 (Transcript, p. 67, also 102).

Early in July, 1912, and after these matters had been concluded, a suit was commenced in the court below, entitled Clark, et al., vs. Arizona Mutual Savings and Loan Association and the Arizona Trust Company, wherein Sims Ely was appointed receiver of both companies. Mr. Kline was not a party to this suit.

Upon July 13, 1914, Mr. Kline commenced this suit against the defendants the Trust Company and the Loan Association and Sims Ely the Receiver, upon the note of the Trust Company and to foreclose his lien upon the collateral (p. 10, Transcript). The complaint is in the ordinary form (pp. 1-10, Transcript). The defense set up in the answer was that in the Clark litigation a decree had been entered adjudging that the Trust Company had at the time of the transaction with Kline

no title to the collateral pledged and that it belonged to the Loan Association and that any attempted transfer of this collateral from the Loan Association to the Trust Company was void; that a master had been appointed in the Clark litigation and a reference had for the purpose of determining and adjusting all claims against either the Trust Company or the Loan Association and that Kline should be compelled to present and litigate his claim therein, (pp. 14-17, Transcript).

Upon the trial the plaintiff and appellant introduced the principal and collateral notes and mortgages, the escrow agreement and the letter of the Valley Bank approving the collateral and the testimony of Mr. Kline as to the facts leading up to the sale of his stock to the Trust Company, substantially as recited above, and rested. (pp. 62-105), Transcript).

The defense announced it had no further evidence to offer other than the decrees in the Clark litigation which were received over the objection and exceptions of the appellant to the effect that Kline not being a party or privy to the Clark litigation and his interest and lien having initiated prior to the commencement of that suit he was not bound thereby. (pp. 105-107, Transcript).

A decree was entered that the plaintiff and appellant take nothing by his action other than that he be permitted to present his claim to the master appointed in the Clark suit (pp. 45-46, Transcript); from which judgment this appeal is perfected (pp. 49-57, Transcript).

ARGUMENT.

ASSIGNMENTS OF ERROR.

I.

That the Court erred in admitting in evidence the decree entered in the above-entitled court in the case of Charles W. Clark versus the Arizona Mutual Savings & Loan Association et al., dated February 27, 1913, and the decree entered in said court on the 12th day of March, 1914, in said last mentioned action, wherein said court did decree that at the time of the transfer by the Arizona Mutual Savings & Loan Association to the Arizona Trust Company of the assets of the said Arizona Mutual Savings & Loan Association, including the assets the subject of litigation herein, the Arizona Trust Company had no right, power or authority to receive from said Arizona Mutual Savings & Loan Association any of said assets and that said attempted transfer was void and of no effect, over the objections of complainant and appellant duly entered of record in said cause, to-wit:

“We object to the competency and relevancy of the judgments themselves upon the ground that Arthur A. Kline was not a party to said litigation and that his interest, if any he had, initiated prior to the institution of the suit of Clark versus the Arizona Mutual Savings & Loan Association, et al., and, therefore, we are not bound by any decree which may be rendered in the Clark litigation”;

to which ruling admitting said judgments the complainant and appellant then and there excepted, which exception was noted of record. (pp. 50-51, Transcript).

II.

The District Court erred in holding that the judgments entered by said Court in the said cause of Charles W. Clark, complainant, versus the Arizona Mutual Savings & Loan Association, et al., defendants, wherein it was decreed that the transfer of the assets of the Arizona Mutual Savings & Loan Association to the Arizona Trust Company was void, determined and established as against the complainant and appellant herein, he not being a party to said litigation and his rights, if any, having initiated prior to the institution of said cause of Clark versus the Arizona Mutual Savings & Loan Association, et al., that the Arizona Trust Company had no title to the collateral pledged to this complainant and that therefore this complainant had no right to the possession of said collateral as against the receiver Sims Ely, appointed in said cause of Clark versus the Arizona Mutual Savings & Loan Association, et al., (pp. 51-52, Transcript).

The foregoing assignments raise questions which can best be discussed together and for the convenience of the court we ask leave so to do.

Kline, prior to March 2, 1912, was a stockholder of the Arizona Mutual Building and Loan Association.

Upon that day he sold his stock to the Arizona Trust Company, taking its note for \$5,532.00, the then value of his stock, which note was secured by the delivery in escrow of certain notes secured by real estate mortgages as collateral security for the payment of the principal note (pp. 64-66, also 91-92, Transcript).

In July, 1912, (four months later) was commenced the Clark litigation wherein it was adjudged that the transfer to the Arizona Trust Company of the assets of the Arizona Mutual Savings and Loan Association, including the collateral involved herein, was void.

The record in this case contains no evidence tending to establish the invalidity of the transfer from the Mutual to the Trust Company unless it be found in the Clark decrees. The answer raises no issue, independent of a plea of the Clark decrees, as to the invalidity of the transfer and no independent issue as to want of title in the Arizona Trust Company. The answer is that the Clark judgments establish the invalidity of the transfer and the want of title in the Trust Company, the assignor of Kline. There is no allegation of fraud, insolvency or want of corporate power nor offer of proof to avoid what, upon the face of the record, appears to have been perfect title in the Trust Company outside the plea and proof of the Clark judgments.

Unless the appellant Kline, is bound by the Clark decrees he was and is entitled to judgment as prayed in the bill.

“The assignee of a note is not affected by any litigation in reference to it beginning after the assignment,” and “no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.”

Freeman on Judgments, Sec. 162.

Brown v. Fletcher, 203 Fed. 70.

Ingersoll v. Jewett, 16 Blatchf. 378, Fed. Case No. 7039.

Carroll v. Goldschmidt, 83 Fed. 508.

Rooney v. Barnette, 200 Fed. 700; 119 C. C. A. 116.

The Clark suit was in no sense a proceeding in rem and the adjudication does not conclude strangers.

Aldridge v. Pardee, 24 Tex. Civ. App. 254; 60 S. W. 789, affirmed, Pardee v. Aldridge, 189 U. S. 429; 47 L. Ed. 883.

Even though Kline be regarded as a stockholder in the Arizona Mutual Savings and Loan Association, which he was not, at the time the Clark suit was commenced, he would not be bound by the decree.

Victor Talking Machine Co. v. American Graphophone Co., 189 Fed. 359, at 374.

ASSIGNMENT OF ERROR III.

Said District Court erred in holding and decreeing that the complainant, Arthur A. Kline, take nothing by his said action, and that he is not the owner nor entitled to the possession of any of the securities or assets, the subject of this litigation for the reason that all of the competent evidence introduced upon the trial of said cause shows that said Arthur A. Kline, on or about March 2, 1912, and more than five months prior to the institution of the cause of Charles W. Clark versus the Arizona Mutual Savings & Loan Association, et al., sold to the Arizona Trust Company stock in the Arizona Mutual Savings & Loan Association and in consideration therefor received of and from the Arizona Trust Company its certain promissory note due on or before July 1, 1912, in the sum of Five Thousand Five Hundred and Thirty-two Dollars (\$5,532.00) with interest and attor-

neys fees, which note was and is unpaid, and that at the time of the execution and delivery of said note and to secure the payment thereof the said Arizona Trust Company endorsed in blank and delivered to the Valley Bank in pledge for the use of the said Arthur A. Kline certain negotiable promissory notes secured by mortgages on real estate in Arizona, as follows:

No.

119.	E. E. Wardlop, Bisbee.....	\$1,500.00	\$1,500.00
246.	E. W. Booker, Globe	500.00	500.00
250.	E. E. Smith, et al., Wickenburg	339.25	400.00
253.	O. W. Jennings, et al., Wicken- burg	688.00	800.00
268.	Thos. P. Alger, Safford	564.00	600.00
261.	Phoenix Construction Co., Phoenix	1,982.00	2,000.00
		-----	-----
		\$5,573.25	\$5,800.00

and that at the time of the pledging of said notes to the said Arthur A. Kline each and all of said promissory notes, save and except No. 119, E. E. Wardlop, were unmatured and were in the actual possession of the said Arizona Trust Company and endorsed in blank by the Arizona Mutual Savings & Loan Association, and that at that time said Kline was entitled to rely upon and did rely upon such plenary evidence of title in said Arizona Trust Company, and by virtue of the pledge aforesaid did become entitled to the possession thereof until said principal note was paid.

“Actual possession of a negotiable instrument payable to bearer or indorsed in blank is plenary evidence of title in the holder.”

Collins v. Gilbert, 94 U. S. 753; 24 L. Ed. 170.

That the Trust Company was in actual possession of the notes pledged is clear. (Testimony of Kline, pp. 91-92, Transcript).

That the notes were endorsed in blank at the time of Kline's sale of his stock to the Trust Company is shown by the endorsements (pp. 70, 73, 76, 78, 80, 82, Transcript) and the testimony that they were receipted for by Mr. Christy, the bank cashier and escrow holder, the afternoon the sale was made, March 2nd (p. 92, Transcript). See also Escrow instructions, pp. 63-66, Transcript.

ASSIGNMENTS OF ERROR IV AND VI.

IV. The District Court erred in holding that as to unmatured notes pledged to said Kline; said Kline was not an innocent holder in due course (p. 53, Transcript).

VI. The District Court erred in holding that said Kline was not an innocent purchaser of said collateral for value (p. 54, Transcript).

One who takes a note as collateral security for a debt then created, and on the faith thereof, without notice of equities, is a holder for value.

Randolph on Commercial Paper, Sec. 993.

When a bill or note of a third party, payable to or-

der, is endorsed as collateral security for a debt contracted at the time of such endorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and entitled to protection against equities and offsets and other defenses available between antecedent parties, provided, of course, that the bill or note transferred as collateral security is itself at the time not over due. The doctrine rests upon clear grounds. There is an evident present consideration for the transfer of the collateral bill or note; a present change in the legal rights of the parties. And the text writers, supported by an almost unbroken train of decisions, agree that the endorsee is entitled to protection to the extent of the debt secured.

Daniel on Negotiable Instruments (6th Ed.) Sec. 824 (1).

In this case Kline sold his stock at its book value (the only value shown) to the Trust Company and received the note of the Trust Company for \$5,532.00 and the collateral notes in payment therefor. (p. 92, also p. 98, Transcript).

Even if it be regarded as a transaction wherein collateral was furnished to secure an antecedent debt as suggested below (which theory we feel assured finds no support in the evidence) upon the record made the title of Kline is superior to that of the Receiver.

It is generally conceded that the conflict of authority discussed * * * * has been settled in those states which have adopted the statute (negotiable instrument law) so that it is the rule in those states, in view of the sev-

eral provisions of the statute, that one who takes a note merely as collateral security for a pre-existing debt is regarded as a holder for value.

Daniel on Negotiable Instruments, (6th Ed.) Sec 831 a.

“Value is any consideration sufficient to support a simple contract. Any antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.”

Rev. St. Arizona, 1901, Par. 3328, idem sec. 25.

“Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time.”

Rev. St. Arizona, 1901, Par. 3329, idem sec. 26.

“Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.”

Rev. St. Arizona, 1901, Par. 3330, idem sec. 27.

“An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.”

Rev. St. Arizona, 1901, Par. 3333, idem sec. 30.

“A holder in due course is a holder who has tak-

en the instrument under the following conditions:

1.—That the instrument is complete and regular upon its face.

2.—That he became the holder of it before it was overdue, and without notice that it had been previously been dishonored, if such was the fact.

3.—That he took it in good faith and for value.

4.—That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.”

Rev. St. Arizona, 1901, Par. 3355, idem sec. 52.

“Holder” means the indorsee or payee of a bill or note, who is in possession of it or the bearer thereof.

Rev. St. Arizona, 1901, Par. 3487 (184), renumbered as Sec. 190, Laws 1905, p. 24-27.

While the plaintiff, Kline, went much further in his proof than the necessities of the case might technically have required to eliminate any question as to whether he had notice of the defect in the title of the Arizona Trust Company to the notes negotiated to him, the evidence establishes:

(1) The instruments are complete and regular upon their face. (Transcript, pp. 66 to 82).

(2) All were unmatured at the time of negotiation except the Wardlop note which was past due. (Transcript, pp. 66 to 82).

(3) Kline on March 2, 1912, sold stock in the Arizona Mutual Savings & Loan Association to the Arizona Trust Company of the book value of \$5,532 (the only value shown), for which he took the principal note of

the Trust Company for \$5,532 with interest and attorney fees, secured by the notes and mortgages in suit. All of the collateral notes were at the time in the possession of the Trust Company and were endorsed in blank by the Loan Association and the Trust Company. (Transcript, pp. 64-82, 92 and 98).

This would appear to satisfy the third condition of the statutes cited above, i. e. "that he took it in good faith and for value".

(4) At the time the notes were negotiated Kline had no notice of any defect in the title of the Trust Company. (Testimony of Kline, Transcript, pp. 83-102).

A vigorous cross examination fails to show that Kline knew any facts which would be notice of defect in the title of the Trust Company, and in truth there is nothing to show that there was any defect in its title.

Something was said in argument below as to the constructive knowledge imputable to Kline as a stockholder in the Loan Association. It is difficult to take the suggestion seriously. A stockholder is never affected with constructive notice of what the records of the corporation might disclose (always excepting the charter and by-laws). And even were he, there is nothing in this record to show what the facts are, as shown by the corporate records, the knowledge of which appellees seek to impute to Kline.

Constructive notice has no place in this case in any event.

"To constitute notice of an infirmity in the instrument or defect in the title of the person nego-

tiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.”

Par. 3359, R. Stat. Arizona, 1901, (Sec.) 56.

One who purchases a promissory note before maturity and for full consideration and to whom the note is at the time indorsed by the payee and holder, takes such note in the ordinary course of business; and the fact that the purchaser took such note relying wholly upon the sufficiency of the mortgage security, or for the purpose of acquiring the mortgaged property by foreclosure, will in no legal sense affect his bona fides.

Christianson v. Farmers Warehouse Assn., 5 N. D. 438; 67 N. W. 300.

ASSIGNMENT OF ERROR V.

The District Court erred in holding that said Kline take nothing by his said action and that he is not the owner of nor entitled to possession of any of the securities or assets being the subject of said litigation, for the reason that the undisputed competent evidence in said cause shows that the said Arizona Mutual Savings & Loan Association clothed the Arizona Trust Company with apparent title to the collateral the subject of this litigation, and placed said Trust Company in possession thereof and thereby gave the said Arizona Trust Company the opportunity to pledge said collateral to said Kline he being an innocent purchaser for value, thereby estopping the said Arizona Mutual Savings & Loan Association and its said receiver, Sims Ely, from claiming

said collateral as against the said Kline until the payment of the note to secure which said collateral was pledged. (pp. 53-54, Transcript).

The weight of authority and better reasoning appears to be that in case of negotiable paper transferred *subsequent* to maturity a prior party clothing one with apparent title by delivery to him of such instrument endorsed in blank is estopped to contest the title of a holder who has parted with value upon the faith of such apparent title.

Moore v. Moore, 112 Ind. 149; 13 N. E. 673.

May v. Martin, 32 Tex. Civ. App. 132; 73 S. W. 840.

In this case the Loan Association had clothed the Trust Company with apparent title and possession of the notes in suit under blank endorsement. Kline parted with his stock to the Trust Company upon the faith of this title. The Loan Association and its Receiver should be estopped to contest the title he thus acquired.

ASSIGNMENT OF ERROR VII.

The District Court erred in holding that said Kline had any notice or knowledge of the insolvency of the said Arizona Mutual Savings & Loan Association or defect in the title of the Arizona Trust Company to said collateral, at the time of the pledging of said collateral.

We invite the court's attention to the testimony which is short and is found at pages 83 to 102 of the transcript.

ASSIGNMENTS OF ERROR VIII AND IX.

VIII.

The District Court erred in entering judgment in

favor of the defendants herein, said judgment being contrary to the law and the competent evidence in the case. (p. 54, Transcript).

IX.

The District Court erred in not rendering judgment in favor of the appellant in accordance with the prayer of the bill (p. 55, Transcript).

If we are correct in our contention that the trial court erred in admitting and considering the decrees in the Clark litigation as against Kline the decree appealed from is wholly without evidence to support it as there is no other evidence of defect in Kline's title to the collateral.

If the decrees were properly considered we contend that Kline is entitled to the benefits of the protection accorded to an innocent purchaser of unmatured commercial paper except as to the Wardlop note, which was purchased subsequent to maturity.

As to the Wardlop note, we contend that the Loan Association is estopped to claim title as against Kline.

Upon the whole case, and in view of the statement of counsel, page 105, Transcript:

By Mr. Stoneman: We think, as has been developed in this hearing this afternoon, that the facts as far as they can be are pretty well admitted and agreed to. We have no evidence which I could submit which would aid the Court in any way upon the facts in the case, and therefore are not submitting any evidence because of an agreement with Mr. Lewis that the defendants were not to be called upon to

submit certified copies of the two decrees pled in the answer which Mr. Lewis and I have agreed contain the facts so far as they are referred to in the answer. Is that true, Mr. Lewis?

By Mr. Lewis: That is correct. We make no objection to the form of the proof. We do object to the competency and relevancy of the judgments themselves upon the ground that we were not parties to this litigation and that our interest, if any we had, initiated prior to the institution of that suit, and therefore we are not barred by any decree which may have been rendered in the Clark litigation.

By Mr. Stoneman: With that exception it may be stipulated then that we will use in this suit the two decrees as they appear in the records in this court?

By Mr. Lewis: That is correct.

we ask that the decree entered below be reversed, and that the court deem the record as equivalent to a formal case agreed, and direct the District Court to render a decree in accordance with the prayer of the bill of complaint upon the undisputed facts shown by this record.

Respectfully submitted,

THOS. ARMSTRONG, Jr.,

ERNEST W. LEWIS,

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Address: 310-15 National Bank of Arizona Bldg.,
Phoenix, Arizona.

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No. 2692.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS
AND LOAN ASSOCIATION, a Corpo-
ration, THE ARIZONA TRUST COM-
PANY, a Corporation, and SIMS ELY,
as Receiver of the Arizona Mutual Sav-
ings and Loan Association and as Re-
ceiver of the Arizona Trust Company,
Appellees.

BRIEF OF APPELLEES.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DIS-
TRICT OF ARIZONA.

GEORGE J. STONEMAN,

Attorney for Appellees,
Phoenix, Arizona.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS
AND LOAN ASSOCIATION, a Corpo-
ration, THE ARIZONA TRUST COM-
PANY, a Corporation, and SIMS ELY,
as Receiver of the Arizona Mutual Sav-
ings and Loan Association and as Re-
ceiver of the Arizona Trust Company,
Appellees.

BRIEF OF APPELLEES.

To the brief and argument filed in support of this appeal, Sims Ely, for himself, and as Receiver of The Arizona Trust Company and The Arizona Mutual Savings and Loan Association, appellees herein, respectfully submits the following:

ARGUMENT AND AUTHORITIES:

This is an action growing out of the status of the mortgages given by stockholders of The Arizona Mu-

tual Savings and Loan Association to this Association as security for loans made by it to them as stockholders and to which appellant, claiming to be the innocent purchaser thereof for value, sets up the legal and equitable title.

Appellant Kline was, at the time of the transaction had by him with the officers of The Arizona Trust Company, a stockholder of The Arizona Mutual Savings and Loan Association; he was not, on March 1st, 1912, even the owner of shares which had matured (*Transcript of Record, Fols. 72-73*); on the contrary, having heard rumors of the proposed purchase by The Arizona Trust Company of the stock and assets of the Loan Association; in fact, having been called upon by a representative of the Trust Company, who, at this time, was also an officer of the Loan Association, and having at such time, by said officer, been solicited to exchange the shares of stock in the Loan Association for shares of stock in the Trust Company, (*Transcript of Record, Fol. 77*) and, as he says, being hard up for money, he came to Phoenix, for the purpose of arranging some plan under which he could withdraw from the Loan Association and receive some cash for his unmatured stock therein. At this time, Kline was, as is shown by the record, a good business man, accustomed to dealing in large affairs, and it must be presumed with the ability, and having the means at his command, of ascertaining the condition of the Loan Association, in which he was a stockholder, not only in so far as such conditions might affect its solvency, but also and perhaps of more importance, with the ability and means to form a relia-

ble estimate as to whether the Loan Association, solvent or otherwise, could, through its officers, who, in turn had organized a new company, transfer the assets of its stockholders to such new company.

On March 2nd, 1912, when the arrangement between Kline and the officers of the Loan Association and Trust Company was, as he says, consummated, the Loan Association was insolvent; this was determined in the suit of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, out of which arose the proceedings entitled,

In Re Dennett et al, decided in this court February 15th, 1915; 221 Fed. 350;

And in the case of,

Farmers' & Merchants' Bank vs. The Arizona Mutual Savings and Loan Association et al, 220 Fed., Page 1.

The former case was an application by Dennett for a writ of mandamus and prohibition directed against Honorable William H. Sawtelle, Judge of the United States District Court for the District of Arizona, calling in question the jurisdiction of respondent in that case to enter a decree in the case of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, et al, after the expiration of the term during which the decree was entered on February 27th, 1913.

In the statement of facts, this court, in the case of "In Re Dennett, et al, supra" used the following language:

“Clark complains that the Loan Association is insolvent but that the officers and directors thereof had failed and neglected to dissolve the corporation, to liquidate its obligations or to wind out its business and distribute its assets.”

And further that:

“Without the knowledge or consent of complainant, and many others similarly situated, such officers and directors entered into a corrupt and fraudulent agreement with certain persons, whose names are unknown, whereby it was agreed and understood that the Trust Company should be organized for the purpose of taking over the assets of the Loan Association. * * * * That, accordingly, in the latter part of April, or first of May, 1911, the Loan Association proceeded to sell, assign, transfer and set over to the Trust Company all its said assets, notes and mortgages and other securities of every kind and character, since which time the Trust Company has exercised exclusive control and dominion over and has dealt with such assets and securities as its own property; and that the Loan Association or its officers and directors, or a majority of its stockholders, were possessed of no right, power or authority so to convey or dispose of the assets of the Association. * * * * The complainant prays that the transactions complained against be annulled; that a restitution of the assets of the Loan Association be had and an accounting taken.”

In the opinion of this court, after stating the facts, the court, speaking through Joudge Wolverton, said:

“The manifest theory and purpose of the original bill is and was first to redress a wrong done by the Loan Association, its stockholders participating therein and its directors and officers in fraudulently and without legal or rightful authority transferring

its assets and property to the Trust Company; and secondly, to wind out the affairs of the Loan Association; it being alleged that it was insolvent and disabled from continuing the business for which it was organized and incorporated. Very naturally, the first relief was to recover back the properties that had gone into the hands of the Trust Company fraudulently.”

It has thus by the two cases above cited been adjudged that on and prior to the 12th day of March, 1912, the Loan Association was insolvent and that its attempted transfer of assets to the Trust Company was without legal or rightful authority.

We submit the decree entered in the trial court in this cause should be affirmed, for the reasons:

First:—That the attempted transfer by The Arizona Mutual Savings and Loan Association of its assets to The Arizona Trust Company has been by a court having jurisdiction of the subject matter declared to be void.

Second.—That on March 2nd, 1912, appellant was a stockholder and the owner of unmaturred stock in The Arizona Mutual Savings and Loan Association, which Association was, on that date, insolvent.

Third.—That, on March 2nd, 1912, appellant knew, or should have known, and is charged with the notice which he might have acquired that the Loan Association in which he was a stockholder was insolvent.

Fourth.—That, under these conditions, to sustain the claim made by appellant of his legal and equitable

title to the mortgages in dispute would be to prefer appellant as the owner of unmatured stock in an insolvent corporation, to other stockholders and to permit him by indirection to change his status as a stockholder in such insolvent corporation to that of a creditor.

On July 15th, 1912, a suit was commenced in the United States Court for the District of Arizona, entitled "Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, et al"; and, on March 12th, 1914, a final decree was entered in said suit, modifying a decree theretofore made on February 27th, 1913, in which final decree,

"It is ordered that all properties and assets of every kind and description which were transferred to the Trust Company by the Loan Association be restored to said Loan Association or the Receiver for said Loan Association; that all contracts, conveyances or agreements, which were entered into by the said Loan Association or its agents or officers, be and the same are hereby set aside, vacated and annulled."

The effect of the decision is, as appears from (*Transcript of Record, Fol. 84*) that the attempted transfer of the assets was and is void according to the terms both of the decree of February 27th, 1913, and March 12th, 1914. This language was, upon appeal to this Circuit affirmed in the case of Farmers & Merchants' Bank, appellant, vs. The The Arizona Mutual Savings and Loan Association, appellee, in which the following language is used in affirming the decree of March 12th, 1914:

“We find no error for which the decree of March 12th, 1914, should be reversed; in that decree the rights of the appellant are fully protected and provision is made for the presentation of its claims to the Master in Chancery to be paid out of the available funds which may remain in the Trust Company.

Provision is also made therein for the ascertainment and recovery of assets in the hands of persons not party to the suit.” (ITALICS OURS).

The decree which is thus affirmed recited:

“That all contracts, conveyances or agreements made by the Loan Association, or its agents or officers, be vacated and annulled; that the Trust Company transfer and deliver to the Receiver all property received by it from the use and investment or other disposition of the stock and assets of the Loan Association.”

It is also in the decree above mentioned declared that The Arizona Mutual Savings and Loan Association, at the time of the attempted transfer of its assets and exchange of its shares to The Arizona Trust Company in 1911, was insolvent; if then appellant was, on March 2nd, 1912, a stockholder of the Loan Association, which on that date was insolvent, and if, because of its insolvency, he could not withdraw and change his status to that of a creditor holding securities and assets of the Association, in which he was a stockholder, he is entitled to no other or greater relief in this or any other action than would be that of any other stockholder in such insolvent corporation.

Moreover, he had actual notice of the pendency of the suit at the time when he claimed to have changed his status from that of a stockholder to creditor (*Trans-*

cript of Record, Fol. 78) and he could have ascertained by the most casual inquiry that the litigated questions involved in that proceeding directly affected his claim as a creditor either of the Loan Association or the Trust Company with the right, had he felt so disposed, to intervene.

As a stockholder of the Arizona Mutual, appellant had behind his stock as security only the assets of the Arizona Mutual. It may be conceded that he had a perfect right to sell his stock in the Mutual to the Arizona Trust Company, which he did; it does not, however, follow that, as a stockholder in the Mutual and without reference to whether, at that time, his company was insolvent, he could create for himself any greater or further interest in the Mutual by selling his stock to The Arizona Trust Company than such as he had as a stockholder in the Mutual. This is precisely what Kline did. Not only is this true but, as appears from the record, he knew the Mutual was, at the time he sold his stock to the Arizona Trust Company, without sufficient funds to mature his stock, (*Transcript of Record, Fols. 72-77-78*).

He was a bookkeeper and accountant (*Fol. 72*) and yet upon his own admission, especially for the purpose of determining his status as a stockholder in the Mutual, he asked Olsen, the Secretary, to show him the books and contented himself with looking over the stockbook, (*Fol. 72*). He knew then, or when Olsen, the Secretary, showed him the books, he could and should have ascertained the conditions as to the solvency of this company. If it was solvent, he would not have

wanted to sell his stock or, so desiring, would have been able to sell his stock for much more than he received for it. If it was insolvent, then, upon the authorities submitted in this brief, he had no right to withdraw as a stockholder. As such stockholder in the Mutual, he had a proportionate interest in its assets; if he sold his stock to the Trust Company, he then is charged with notice that the transaction, not being upon a cash basis, imposed upon him the burden of determining the value of the securities pledged by the Trust Company for the payment of the purchase price of his stock, and yet the record discloses that with knowledge that the officers of the Mutual Savings and Loan Association were also officers of The Arizona Trust Company, and, in that dual capacity, were taking from the shareholders of the Loan Association assets properly belonging to them, without further investigation, he now assumes to base his title to the mortgages in question, because of the fact that he asked Edwards and Le Baron in their capacity as officers of the Trust Company whether they had good title to the securities, which, as officers of the Loan Association, they transferred to their new company. (*Fols.* 74-75-76-77).

Appellant held this stock, by his own statement, from March 2nd, 1912, without setting up a claim to it, until July 13th, 1914, and, during all this time and after he had heard from Mr. Smith, who was in charge of the Arizona Trust Company, that there was talk about an action against the Trust Company and the Savings and Loan Association (*Fol.* 78), and covering the period when the suit of Charles W. Clark was being tried, in-

volving the ownership of the various securities, a part of which Appellant now claims, he sat idly by and permitted a decree to be entered in the Clark suit, determining that the attempted transfer of these very assets by the Loan Association to the Trust Company was fraudulent and void.

The responsibility for these actions is attempted to be evaded by him through his statement that, as a stockholder in the Trust Company, he was not bound by the decree because not party to the suit, and that he was an innocent purchaser for value.

It must also be remembered that these notes and mortgages, to which appellant now asserts title, had not even been by him reduced to possession. For these reasons, we submit that Kline is subrogated to such rights only as the stockholders of the Mutual may have in the assets upon the final winding up of the affairs of these two companies in the hands of the Master and Receiver, and that, if any of these stockholders, who executed the notes now claimed to be the property of Kline as collateral payment for the notes given by the Arizona Trust Company, are indebted to the Mutual, they must pay their debts and out of the surplus after the payment of debts, if any remains, they would be entitled to their pro-rata share of the distribution of such assets to this extent only. Should the notes be paid, Kline, if he had retained his status as a stockholder in the Mutual, would be permitted to share in the proceeds.

AUTHORITIES.

It seems to be generally held that the right to withdraw and receive what has been paid exists only where

the association is a going concern and cannot be exercised where the association is, at the time, known to be insolvent, for the condition of solvency is incompatible with the right of any member to withdraw his contribution to the general fund until the proper proportion of the losses has been ascertained and adjusted.

Aldrich v. Gray, 147 Fed. 454; 77 C. C. A. 597; 8 Ann. Cas. 832;
Pacific Coast Sav. Soc. v. Sturdevant, 165 Cal. 687; 133 Pac. 485; 49 L. R. A. (N. S.) 1142 and note;
Rabbitt v. Wilcoxon, 103 Ia. 35; 72 N. W. 306; 64 A. S. R. 152; 38 L. R. A. 183;
Wilcoxon v. Smith, 107 Ia. 555; 78 N. W. 217; 70 A. S. R. 220.

“It being ascertained that the association is in fact insolvent, a withdrawing member has the right only to a pro-rata share in the distribution of the assets.”

Colin v. Wellford, 102 Va. 581; 46 S. E. 780.

“The fact that a withdrawing member believed the association to be solvent when he gave his notice cannot entitle him to more than his just proportionate part of the funds if the association is in fact insolvent.”

Pacific Coast Sav. Soc. vs. Sturdevant, 165 Cal. 687; 133 Pac. 485; 49 L. R. A. (N. S.) 1143 note.

Aldrich vs. Gray, 147 Fed. 453, Ann. cases, Vol. 8, 833 (note),

was a case where defendant Gray bought stock in a building and loan association and within a short time, having satisfied himself that the affairs of the association were in a bad condition, withdrew and was re-paid

to the full extent of his stock subscriptions and a Receiver was appointed with directions to take possession of the assets and to bring such suits as were necessary for their recovery, and it was held:

“With respect to the course taken by him (Gray) to effect his withdrawal, it is to be observed that his relations with the other stockholders of his class were mutual and no one more than another was responsible for the misfeasances and neglect of duty by the officers of the association, and a serious question arises whether he could avail himself of their desertion of their duties as a sufficient reason for his neglect to take such steps as would enable him to give his written notice of withdrawal to the board of directors. The statute evidently devolves upon the board the exercise of certain duties for the protection of other stockholders, and the action of the board is made a condition of the right to withdraw. But, if it were held that, in the circumstances stated in regard to the method of conducting the corporate affairs, the intervention of the board was not absolutely essential, still if the conditions were such that Scripps was not entitled to withdraw, so that if the board were present to act upon his notice the withdrawal could not have been lawfully permitted, the question of the sufficiency of his method of procedure becomes immaterial. For in such case, the essential conditions of his right did not exist.”

Quoting further:

“The current of decisions in this country in regard to this subject seems to be that, when insolvency supervenes in the status of such associations, the right of withdrawal which before existed is suspended, in the absence of some express provision to the contrary. This is the result of the mutuality of the stockholders and the equity of equality, which is

of the essence of their relation to each other. If it were otherwise, and the stockholders could at will successively take their investments out and desert the failing enterprise, those remaining would have to bear the brunt of the joint misfortune.”

Citing cases.

This decision is by the Circuit Court of Appeals for the Sixth Circuit, speaking through Mr. Justice Sevens.

It may be conceded that the facts of this case are not on all fours with the case at bar, but the principle therein laid down is fully applicable in that Kline, being the owner of unmatured shares in an insolvent loan association, attempted to withdraw and, failing in this, sought to accomplish the same end by exchanging his stock for the assets of the insolvent Mutual Loan Association, of which he was a withdrawing member; and so, we say, that, even had it not been decided by the District Court of Arizona (which decision has been approved by this Circuit Court) that the Trust Company had no right to the assets to which appellant sets up his claim, he would still be unable to assert this right under the principle laid down in the case of *Aldrich vs. Gray*, *supra*.

On pages 11 and 12, Brief of Appellant, Revised Statutes, 1901, Paragraph 3333 is quoted, for the purpose of defining that a holder in due course is a holder who has taken the instrument under the following conditions:

First: That the instrument is complete and regular upon its face.

Second: That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.

Third: That he took it in good faith and for value.

Fourth: THAT, AT THE TIME IT WAS NEGOTIATED TO HIM HE HAD NO NOTICE OF ANY INFIRMITY IN THE INSTRUMENT OR DEFECT IN THE TITLE OF THE PERSON NEGOTIATING IT.

We believe the facts in this case demonstrate that appellant was not a holder in due course in that not only did he not accept in good faith the securities to which he now asserts title, but that he actually had notice of the infirmity in the instrument and defect in the title of the Arizona Trust Company.

Without repeating what has already been said, the record shows that with the books of the corporation submitted to him upon his request, he chose to make no inspection of any records, except the stock-transfer book and assumed the right to rely upon the statements of Olsen and Edwards, particularly laying stress upon the fact that, when he consulted these men, he consulted them as officers of the Trust Company; and, while knowing they were also officers of the Loan Association, assumed the further right to rely upon their statement made as officers of the Trust Company, that they had good title; he would have this court believe that, under these conditions, he could effect a withdrawal as a stockholder from the insolvent Loan Association and bind the remaining stockholders by the statement of these faith-

less officers speaking in this behalf in the capacity of officers of a company organized to loot and rob the treasury of the Loan Association.

As was said in the case of Aldrich vs. Gray, *supra*, he, as a stockholder of the Loan Association, was as much responsible for the very acts for which he now attempts to evade responsibility as were the officers themselves.

As appears from the (*Transcript of Record, Fol. 72*), Kline was told in the latter part of February, 1912, by the Secretary of the Mutual Savings and Loan Association that, on account of the mismanagement of some of the officers, his stock would not mature; and, in the latter part of 1911, (*Fol. 77*) he was advised by Edwards and LeBaron, even then officers both of the Mutual Savings and Loan Association and Arizona Trust Company, that they were contemplating the merging of the assets of the Mutual Loan Association with the Arizona Trust Company and he was requested to exchange his shares of the Arizona Mutual for the same amount of shares of the Arizona Trust Company. At this time, Kline told these men that he did not want to change his shares. Upon this information, Kline came to Phoenix and discovered by inquiries that, because the examiner had withdrawn and thrown out a certain amount of loans, the value of all stock had been reduced so that it would not mature. Whereupon, Kline did not wait until it matured but took immediate steps to withdraw the money, which, as a stockholder, he had paid in upon his stock.

Kline was a bookkeeper and a business man; in a matter of this importance to him, it became necessary, and we submit the obligation was placed upon him, to determine whether or not upon the proposal made by LeBaron, Edwards and Olsen to purchase his stock, giving as security for the note of the Arizona Trust Company the assets of the Loan Association, the Loan Association could legally so dispose of its assets; and whether the Trust Company, by the purchase of shares, could become a stockholder in the Loan Association or could, as stockholder, have a voice in the disposition of its assets or management of its affairs. If, as a matter of law, the Arizona Trust Company could not do this, Kline, as an individual dealing with the Trust Company for his own protection, was charged with notice of this want of power.

In the case of *Standard Savings & Loan Association vs. Aldrich*, decided in the Sixth Circuit Court of Appeals, speaking through Mr. Justice Lurton, the question arose upon the right of the Michigan Savings and Loan Association to loan money to the Standard Savings & Loan Association and to take from the latter as security for the loan certain real estate mortgages made to it by borrowing members. It was held in this case that:

“The Michigan Association had no power to become a shareholder in the Standard Association * * ; the objects of such association being only to lend the funds contributed by members for the purpose of building and improving homesteads, one such association could not become a member of the other, nor

could it lend its own funds, except to its own members, for the purpose indicated.” Citing,

Thomps Bldg. & L. Asso., 2d ed. p. 215, par. 114;
4 Am. & Eng. Enc. Law, 2d ed. p. 1028;
Kadish v. Garden City Equitable Loan & Bldg. Asso.
151, Ill. 531; 42 Am. St. Rep. 256, 38 N. E. 236;
North America Bldg. Asso. v. Sutton, 35 Pa. 463;
78 Am. Dec. 349;
Mechanics’ & W. Mut. Sav. Bank & Bldg. Asso. v.
Meriden Agency Co., 24 Conn. 159.

Further:

“The withdrawal of a shareholder is the withdrawal of capital pledged primarily to creditors and to carry on the business for which the association was organized. The funds applicable, therefore, to the payment of withdrawing shareholders is the fund arising from the current contributions of a solvent and going association; and no other funds can be legitimately so applied. * * * * We conclude, therefore, that no authority existed, express or implied, to borrow money to meet the claims of withdrawing shareholders. Such a borrowing would not be for the purpose of paying debts and liabilities in due course of business. Appellants, as we have before stated, had notice that the borrowing was for the payment of withdrawing shareholders, and are constructively charged with knowledge that the managers were acting without power in so doing and in assigning the mortgages of borrowing shareholders to secure the loan. A contract beyond the scope of the power of the Michigan association, express or implied, cannot be enforced by an appeal to the rules of estoppel. Any such application of the doctrine would be, in effect, to enlarge the power of the corporation in accordance with the discretion of its managers, violating thereby the rights of innocent shareholders and a sound public policy.” Citing,

Central Transp. Co. v. Pullman's Palace Car Co.,
139 U. S. 60, 35 L. ed. 68, 11 Sup. Ct. Rep. 478;
Pittsburgh C. & St. L. R. Co. v. Keokuk & H. Bridge
Co., 131 U. S. 371, 389, 33 L. ed. 157, 163, 9 Sup.
|Ct. Rep. 770;
Miller v. American Mut. Acci. Ins. Co., 92 Tenn. 167,
176, 20 L. R. A. 765, 21 S. W. 39;
McCormick v. Market Nat. Bank, 165, U. S. 538 549,
41 L. ed. 817, 821, 17 Sup. Ct. Rep. 433;
Re National Permanent Ben. Bldg. Soc., L. R. 5,
Ch. 309;
California Nat. Bank v. Kennedy, 167 U. S. 363, 368.
42 L. ed. 198, 200. 17 Sup. Ct. Rep. 831.

Further quoting from this opinion and applying the principle to the situation existing in that case, it is held:

“The claim that petitioner can recover for money had and received on the ground that the Michigan Association has had the benefit of money and *ex aequo et bono* should repay it cannot be maintained upon these facts. The only persons who received benefits were the withdrawing members of the Michigan who were not entitled to it. As the payments, instead of being beneficial to the association, hastened its failure and diminished its resources by reducing its membership and giving withdrawing members what they had no right to receive, when they had no funds in the treasury; this was the first necessary effect of such payments. Its second was the wrong done to the remaining members whose share in its assets is by so much less because of what was paid to withdrawing members. THE THIRD AND NECESSARY EFFECT, AND THAT SCARCELY THE LESS INJURIOUS THAN THE FIRST, IS THAT, IF THE CLAIM OF PETITIONER IS SUSTAINED, AND IT IS GIVEN THE STATUS OF A CREDITOR, THE MEMBERS' RIGHTS IN THE ASSETS OF THE MICHIGAN ASSOCIATION ARE SUBORDINATED TO PETITIONER,

AND THEY CAN SHARE ONLY IN THE ASSETS, IF ANY THERE BE REMAINING AFTER PETITIONER'S CLAIM IS PAID."

Standard Savings & Loan Association vs. Aldrich, 89 C. C. A. 646; 163 Fed. 216, with note, same case 20 L. R. A. (N. S.) 393.

The case of *Standard Savings & Loan Association vs. Aldrich*, supra, is peculiarly applicable to the facts in the case at bar in that, as in that case, Kline knew that the Loan Association had no money which it could rightfully use to pay off matured stock; he knew that, for this reason, his stock had not matured; he knew that this was caused by the mismanagement of the Loan Association by its officers; he knew that the Trust Company was attempting to buy the stock and did buy his stock in the insolvent Loan Association, and he knew the notes offered to him as collateral for the note given by the Trust Company to secure the purchase price of his stock were given by stockholders of the Loan Association and were assets of the Loan Association and,

"He was constructively charged with knowledge that the managers of the Loan Association were without power in so doing and in assigning the mortgages of borrowing stockholders to himself to secure the same, which he now claims to be due from the Loan Association."

The only difference between these two cases is that in the one, the Michigan Association lent its money and, in the case at bar, Kline loaned to the Trust Company his stock.

By the decree in the case of *Charles W. Clark vs. The Arizona Mutual Savings and Loan Association and The Arizona Trust Company*, above cited, the Trust Company was without power to receive from Kline his stock of the Loan Association in exchange for stock of the Trust Company nor to divert its assets.

For the convenience of the court, the decree of March 12th, 1914, is appended to this brief.

If Kline now insists, under these conditions, upon remaining a stockholder in the Trust Company, he is entitled, under the decree of the Clark suit, to such assets as may be found by the Master and Receiver to be properly assets of the Trust Company; he might have had the right and it was his privilege to disavow the contract made with the Trust Company and remain a stockholder in the Loan Association, which status he rightfully should assume; and, so far as the stockholders of the Loan Association are concerned, is compelled to assume to the end that as is the rule established in the cases above cited, he shall be compelled to share in the hazards of this venture and as a stockholder in the Loan Association be denied preference over other stockholders.

We respectfully submit that, for the reasons and upon the authorities herein submitted, the decree of the lower court should be affirmed and the Receiver be permitted to reduce these mortgages to cash as a part of

the assets in his hands for distribution among the stockholders of the insolvent Loan Association.

Respectfully submitted,

GEORGE J. STONEMAN,

No. 408 Goodrich Block,

Phoenix, Arizona.

Solicitor for Appellees.

Service of three copies admitted, Feb. 9, 1916.

ERNEST W. LEWIS,

THOS. ARMSTRONG,

Solicitors for Appellant.

DECREE (March 12, 1914).

The bill in this cause was filed by a stockholder of the Arizona Mutual Savings and Loan Association on behalf of himself and all other stockholders who might desire to come in and join in the suit. Its fundamental equity is the wrongful transfer of assets of the Loan Association to the Trust Company and the fundamental relief prayed for is the restitution of the assets of the Loan Association to that corporation, to be distributed to its stockholders on its dissolution by order of the Court.

The answers of both the Loan Association and Trust Company show the circumstances of the transfer of the assets of the Loan Association were clearly and plainly illegal and fraudulent and without effect to legally transfer these assets and clearly establish the right of the Loan Association to a full restitution.

The various intervening petitions filed prior to the decree in this cause contain in each a prayer "that the transaction therein set forth as made between the said Loan Association and the said Trust Company may be declared to be annulled and of no force and effect, and that a restitution of all the assets of the defendant Loan Association from the defendant Trust Company be adjudged and decreed; that an accounting between both of the defendants above named be had and taken; that the Court appoint a Master to take proof of the facts alleged in the bill and to determine the rights and equities of all the parties concerned herein, and that the effects of the Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto." In neither the original bill nor in any intervening petition is there any prayer for a confirmation of the title of the Trust Company or that the Court should vest the title of the property in that company.

In all the pleadings the relief sought is based on the legal and equitable rights of the Loan Association to

have a complete restitution of its assets and to have its assets marshalled and distributed to those found to be entitled thereto.

It is too clear to admit of argument that the assets of the insolvent corporation after the payment of its just debts are to be distributed equally amongst its stockholders and that the Court has no warrant of law to make any other disposition of them as between the stockholders. There is no order in this case giving notice to the stockholders to present their claims to the assets of the company or to show their interest in its property.

The decree entered herein on the 27th day of February, A. D. 1913, without such notice and opportunity being afforded and without referring the case to a Master, as prayed in the bill, to determine the rights and equities of all parties concerned, is that said stockholders mentioned in the decree shall receive all they have paid in, not their proportionate share of the assets of the Loan Association and by this means these particular stockholders are relieved of all participation in any losses of the Loan Association and are given a lien upon said assets to the exclusion of ther stockholders.

It is fundamental that where a judgment or decree has been made which is responsive to the pleadings and in the due course of the lawful jurisdiction of the Court, such decree is beyond the power of the Court to modify or change after the adjournment of the term at which it is rendered, but it does not follow that because this is so that the Court may not set aside or modify a judgment which is not of such a character. In order to render the judgment or decree a finality, the emphatic requirement is that it must be responsive to the matters litigated, and in consonance with the legal relief to which the facts averred show the parties to be entitled.

The question is, has the Court jurisdiction to the extent claimed: and to constitute this there are four essentials:

First: The Court must have cognizance of the class of cases to which the one adjudged belongs.

Second: The proper parties must be present.

Third: The point decided must be in substance and effect within the issues.

Fourth: The Court must have proceeded after having acquired jurisdiction of the case "according to established modes governing the class to which the case belongs."

A Court must not go outside of its appointed sphere and it is impossible to concede that because A. and B. are parties to a suit, that the Court has the right or power to decide or determine any matter in which they are interested whether the matter is involved in the pending litigation or not. A judgment on the matter outside the issues is of necessity altogether unjust because it concludes a point upon which the parties have not been heard. In order to make a judgment conclusive not only the proper parties must be present, but the Court must act on the property according to the rights which appear on the record.

It is the opinion of the Court that the decree of February 27th, 1913, which attempts to vest the title of the assets of the Loan Association in the Trust Company is beyond the issues of the case made by the bill and answers and intervening petitions, it being shown by the pleadings that the Loan Association was insolvent when it did so and that it received no legal consideration for such transfer.

I am likewise of the opinion that the Court exceeded its powers on the pleadings and proof before it when it gave a lien to the intervening creditors on the assets of the Loan Association in the hands of the Trust Company for the amount they had paid in and compelled the parties who were interested in the assets of the Loan Association to bear all the losses incurred by the Loan Association in the conduct of its business.

IT IS THEREFORE ORDERED that the decree of the 27th day of February, A. D. 1913, be and the same is hereby modified as follows:

IT IS ORDERED that all the properties and assets of every kind and description which were transferred to the Trust Company by the Loan Association, be restored to the said Loan Association, or the receiver for said Loan Association, and that all contracts, conveyances or agreements which were entered into by the said Loan Association or its agents or officers, be and the same are hereby set aside, vacated and annulled.

IT IS FURTHER ORDERED that the Trust Company transfer and deliver to the receiver in this cause, all property of every kind received by it, its officers or agents, from or on account of the transfer of the said assets of the said Loan Association or received by it from the use and investment or other disposition of any moneys or other property of the said Loan Association.

IT IS FURTHER ORDERED that this cause be referred to Edwin F. Jones, Standing Master of this Court, to state the account between the Loan Association and the Trust Company and to that end he shall hear testimony and may examine and inspect all papers on file in this Court or in the hands or possession of the receiver in this cause.

IT IS FURTHER ORDERED that the said Standing Master ascertain and report the exact amount due by said Loan Association to each of its stockholders, and in order to do so he is directed to publish a notice in some newspaper in the City of Phoenix for at least five times, requiring all persons claiming to be stockholders in said Loan Association to file their claim, with proof thereof, within thirty (30) days from the first publication of such notice, and that he send by mail to each of the stockholders of said Loan Association a copy of such notice.

IT IS FURTHER ORDERED that the said Standing Master report on the priorities or equities of all

persons claiming to be interested in the property of the said Loan Association and the order in which same are to be paid out of the assets of the said Loan Association.

IT IS FURTHER ORDERED that the Master report what are the rights of said Loan Association in any assets now in the hands of persons not parties to this suit and whether or not the same can be recovered from the parties to whom they were transferred.

IT IS FURTHER ORDERED that the Master ascertain and report what sum of money or other assets of the said Loan Association were unlawfully used by any officer or agent of either the Loan Association or Trust Company, and whether same or any part thereof can be recovered from said parties or their transferees.

IT IS FURTHER ORDERED that the demurrers to the petitions now on file seeking intervention, be and the same are overruled and that the petitioning parties mentioned in the petition of July 15th, 1913, be allowed to intervene in this cause and present their claims to the Master for adjudication in accordance with this decree.

IT IS FURTHER ORDERED that Sims Ely, the receiver in this cause, be appointed general receiver herein, with all proper powers and that he hold all of the assets and property now in his hands belonging to either of said corporations until the further order of this Court.

All other questions are reserved until the coming in of the report of the Master.

DONE IN OPEN COURT this 12th day of March,
A. D. 1914.

(Signed) Wm. H. SAWTELLE,
Judge.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

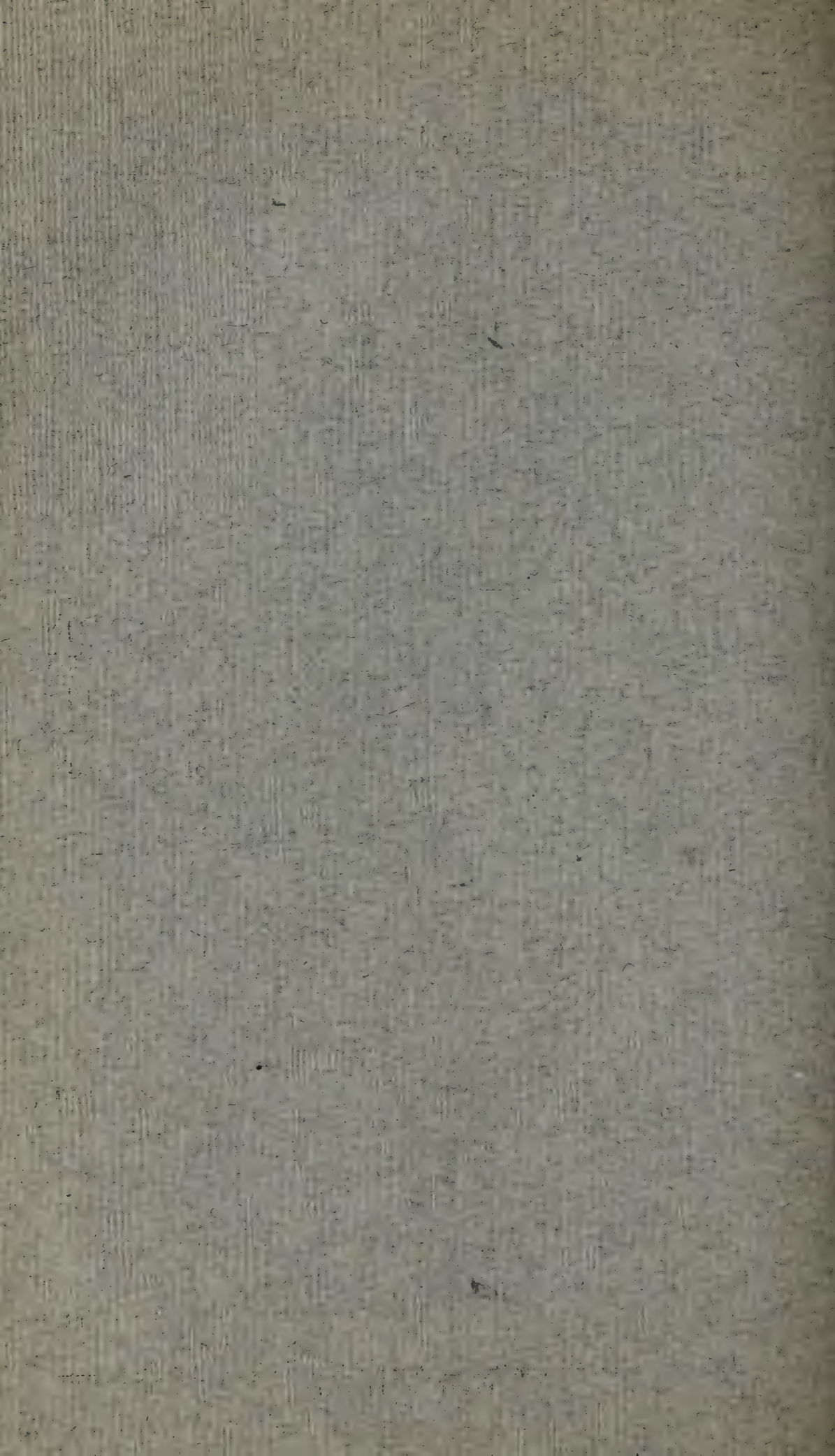
THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation, THE ARIZONA
TRUST COMPANY, a Corporation, and SIMS
ELY, as Receiver of the Arizona Mutual Savings
and Loan Association and as Receiver of the Ari-
zona Trust Company,

Appellees.

Reply Brief of Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Solicitors for Appellant.



In the United States
Circuit Court of Appeals
For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

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THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation, THE ARIZONA
TRUST COMPANY, a Corporation, and SIMS
ELY, as Receiver of the Arizona Mutual Savings
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THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Solicitors for Appellant.

*In the United States Circuit Court of Appeals for the
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ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN
ASSOCIATION, a Corporation, THE ARIZONA
TRUST COMPANY, a Corporation, and SIMS
ELY, as Receiver of the Arizona Mutual Savings
and Loan Association and as Receiver of the Ari-
zona Trust Company,

Appellees.

We cannot agree with appellees that (quoting page 1 appellees brief) "this is an action growing out of the status of the mortgages given by stockholders of the Arizona Mutual Savings and Loan Association as security for loans made by it to them as stockholders." The only loan of the character mentioned is the so-called Wardlop note (Transcript p. 68); the Booker, Smith, Jennings, Alger and Phoenix Construction and Supply Company notes are in ordinary form. The record does not show these as loans to stockholders, and as this was not a building and loan association but an association which loaned money generally, there is no basis for the assumption. (Transcript, pp. 71-82).

On page three, appellees say:

"On March 2nd, 1912, when the arrangement between Kline and the officers of the Loan Association and Trust Company was, as he says, consummated,

the Loan Association was insolvent; this was determined in the suit of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association.”

We have read the decree itself as printed in appellees brief (pages 22-26) and we fail to find in the decree any judgment that the Loan Association was insolvent at the time of the Kline transaction or at any other time. The only time the court uses the word “insolvent” is in its opinion (printed as a part of the decree) where it says:

“It is the opinion of the Court that the decree of Februray 27th, 1913, which attempts to vest the title of the assets of the Loan Association in the Trust Company is beyond the issues of the case made by the bill and answers and intervening petitions, it being shown by the pleadings that the Loan Association was insolvent when it did so and that it received no legal consideration for such transfer.” (Page 24, brief).

The importance of this point is manifest. The fact is (apart from any question of decree) that the Loan Association was not insolvent when Kline sold his stock in March, 1912. Kline was and is entitled to the presumption of solvency.

Warren v. Robinson, 70 Pac. 989; 25 Utah 205;
Jensen v. Montgomery, 80 Pac. 504; 29 Utah 89;
German Security Bank v. Columbia Co., 85 S. W.
761; 27 Ky. Law Rep. 581.

If insolvency was in issue, which it was not, the decrees (even if considered) do not establish insolvency.

We earnestly contend that to deprive Kline of his collateral on the theory of the insolvency of the Loan Association would be to predicate a judgment upon a misapprehension of the record.

We point out the colloquy between counsel and court (p. 85, transcript):

“By the Court:—Had the stock matured at that time? 1

By Mr. Lewis:—That is the purport of the letter, that it would mature at that time, January, 1912. It was simply explanatory of how Mr. Kline came to Phoenix.

By the Court:—I understand. In the meantime did the association become insolvent?

By Mr. Lewis:—No. If your Honor please.”

Appellees say (bottom page 7, brief): “Moreover he (Kline) had actual notice of the pendency of the (Clark) suit at the time when he claimed to have changed his status from that of a stockholder to creditor (Transcript of Record, Fol. 78) etc.”

We do not so read the record. Kline sold his stock in March. The note and collateral was placed in escrow then. (Transcript, p. 64). The collateral was approved in April. (Transcript, p. 67). The Clark suit was commenced in July. Kline’s talk with Smith when he first heard of the Clark suit was in August. (See pages 99-103, Transcript—being same as appellees’ folios 78-82).

The authorities cited by appellees are cases dealing with Building and Loan Associations. The Arizona Mutual Savings and Loan Association is not a Building and Loan Association. It is a savings and loan association, incorporated under the provisions of Chapter Four, Title XII, Revised Statutes of the Territory of Arizona, 1887. In the absence of any proof that it is a building and loan association the law peculiarly applicable to building and loan associations is not in point.

But if the building and loan cases are to be considered, the case of

Standard Savings & Loan Assn. v. Aldrich, 89 C. C. A. 646; 163 Fed. 216, with note.
Id. 20 L. R. A. (N. S.) 393.

is readily distinguished on the facts.

That is a case where suit was brought to recover on a loan made direct to a building and loan association for the purpose of paying withdrawing stockholders, the loan association being insolvent. The court held that the corporation had no power to borrow for such purpose and the lender, having knowledge of the purpose had constructive knowledge of the want of power and could not recover.

In the case at bar the Trust Company, an independent corporation, offered to purchase Kline's stock. Counsel for appellees concedes that he had a perfect

right to sell his stock to the Trust Company. (Middle page 8, appellees' brief). He took as collateral, notes negotiable in character, the title to which was, on its face, in the Trust Company. Any defect in the Trust Company's title to these notes was dependent upon the state of facts under which the Trust Company acquired title. The case cited does not say or attempt to say what the rights of the taker of collateral under such circumstances would be.

— — — — —

The difficulty with the entire case as made by the appellees is that it is based upon assumptions.

Appellees assume that the Loan Association is a building and loan association. There is neither the charter nor the by-laws in the record and the fact is, it is not such an association. (Appellees' brief, p. 16).

Appellees assume that at the time of the sale of the Kline stock to the Trust Company the Loan Association was insolvent (pp. 5, 7, 13, 19, appellees' brief). All the evidence is to the effect that it was solvent and the presumption is that it was solvent. (Transcript, pp. 90-91).

Appellees assume that the decrees in the Clark case established insolvency. There is no decree establishing insolvency. (Page 7, appellees' brief—compare decree p. 25, Appellees' brief).

Appellees assume that Kline had notice of the pendency of the Clark suit at the time he sold his stock to the Trust Company (appellees' brief, p. 7). The fact

is he sold it in March and the Clark suit was commenced in July (p. 64, transcript).

Appellees assume that Kline held this stock (what stock?), by his own statement from March 2, 1912, without setting up a claim to it, until July 13, 1914 (p. 9, appellees' brief).

The fact is that the transaction was an escrow held by the Valley Bank concluded before the Clark suit was commenced. (pp. 63-67, Kline testimony; p. 102, complaint; pp. 3-5 admitted by answer p. 14, Transcript).

Appellees assume that "Kline knew that the Trust Company was attempting to buy the stock and did buy his stock in the *insolvent* Loan Association." (p. 19, appellees' brief). This is directly contrary to the evidence of Kline, the only witness. (pp. 90-91, transcript).

Appellees assume that Kline knew the notes offered to him as collateral for the notes given by the Trust Company to secure the purchase price of his stock were given by stockholders of the Loan Association and were assets of the Loan Association. (Page 19 brief of Appellees)

Only one of the notes was given by a stockholder; the Wardlop note (transcript, p. 68).

Kline did not know that the collateral was owned by or assets of the Loan Association. The only evidence in the record is to the contrary. (Transcript, pp. 92-95).

Appellees assume, without supporting their position by argument or authority, that the Clark decrees are properly in evidence and that the trial court was cor-

rect in holding Kline bound thereby. Kline's interest in and title to the collateral involved was initiated prior to the commencement of the Clark litigation and we confidently urge that this being so, Kline is not bound by these decrees, and that the court erred in considering them.

[We submit that the decree herein should be reversed and judgment entered in accordance with the prayer of the bill.

THOS. ARMSTRONG, Jr.,

ERNEST W. LEWIS,

Solicitors for Appellant.

Service of the foregoing brief is admitted this 11th day of February, 1916.

GEORGE J. STONEMAN,

Solicitor for Appellees.

No. 2693

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Appellant,

VS.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern
District of Washington, Northern Division.

Filed

DEC 23 1915

F. D. Monckton,

No. 2693

United States
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PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

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Upon Appeal from the United States District Court for the Eastern
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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

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and

POST, RUSSELL & HIGGINS, Exchange Bank
Building, Spokane, Washington,

Attorneys for Defendant and Appellant.

[1*]

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Complaint.

To the Honorable Judge of the District Court of the
United States, for the District aforesaid:

The plaintiff, Davenport Independent Telephone
Company, a corporation organized and existing un-
der and by virtue of the laws of the State of Wash-
ington, and a citizen of said State, having its prin-
cipal office at Spokane, State of Washington, brings
this its bill against the Pacific Telephone and Tele-

*Page-number appearing at foot of page of original certified Record.

graph Company, defendant, a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen of said State, having its principal office at San Francisco, in said State.

And your orator shows and alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said State, and that its principal office is at Spokane, in said State, and that the defendant is a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen of said State, and that its principal office is at San Francisco, in said State, and that the amount in controversy in this cause, as hereinafter shown, is more than three thousand dollars in value, exclusive of interest and costs.

II.

That on the 20th day of June, A. D. 1914, the plaintiff was [2] the owner and in possession of, and in the operation of, a telephone system in Lincoln County, in the State of Washington, consisting of approximately three hundred miles of telephone wires, strung on poles, in said county and reaching and serving the several towns and communities in the said county, and also a local exchange in Davenport, in said county, with wires and poles in said town for the accommodation of the residents of said town, and connecting with the suburban lines before described for the accommodation of the several suburban communities in said county. The plaintiff

was also, on said date, the owner of and in possession of a large number of telephone poles, cross-arms, insulators, and other material usually kept on hand by telephone companies for the purpose of operation and repair, of large value, and was also the owner of and in possession of, as a part of its said telephone system, of storage batteries in duplicate, motor generating charging set with usual power board equipment, modern common battery switchboard, harmonic converters in duplicate, two hundred telephone instruments in use by its customers and of a large variety of other property as a part of and appurtenant to its telephone system. The plaintiff was also the owner of and in possession of a telephone line extending from Davenport, in Lincoln County, to the City of Spokane, in Spokane County, which was employed by plaintiff's system and another independent system in Lincoln County, as a toll line for connections with the said City of Spokane. All the wires of plaintiff's said system, including the toll line to Spokane, were carried by poles, equipped with cross-arms and insulators, set in the public highways of said Lincoln and Spokane Counties, under and pursuant to law of the State of Washington conferring upon telephone companies the right to so use and employ said highways, or were conducted on poles over and across the lands of private individuals under grants of easement by said private individuals to maintain the said lines on their premises, and by virtue of said laws and private grants, plaintiff owned, and held and possessed public or private [3] easements for the maintenance of all its telephone lines as hereinbefore described.

III.

That on said 20th day of June, 1914, the defendant made to the plaintiff an offer in writing to purchase its telephone system or so much thereof as it might lawfully acquire, in words and figures as follows:

“THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY.

Office of the Division Commercial Superintendent.

C. E. HICKMAN. Spokane, June 20, 1914.

Mr. A. T. WEST,
Spokane, Washington.

Dear Sir:

Confirming our conversation of to-day:

1. In the event of the consolidation of the two exchanges now in Spokane the Pacific Telephone and Telegraph Company agrees to make a contract with the Davenport Independent Telephone Company, giving the Davenport Company a connection with the consolidated exchange and through that exchange with the system of the Interstate Company under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane.

2. In the event that the Davenport Company desires to sell its property to the Pacific Company and so notifies the Pacific Company in writing within sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by one of our engineers, representing this company, and in the event of your failure to agree with our representative, the value

is to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.

Our Mr. Hickman is authorized to take up with you any matters in this connection.

Yours very truly,

G. E. McFARLAND,
President."

HDP/AM.

That on the 10th day of August, A. D. 1914, the plaintiff accepted the said offer to purchase its said system by a writing in words and figures as follows:
[4]

"Spokane, Wash., Aug. 10th, 1914.

The Pacific Telephone and Telegraph Co.,

Mr. G. E. McFarland, President, San Francisco,
Calif.

Mr. C. E. Hickman, Div. Com'l. Sup't., Spokane,
Wash.

Gentlemen:

Please be advised that we desire to sell our property to you in accordance with conditions outlined in President McFarland's letter of June 20th, last,

addressed to the writer.

Yours very truly,

DAVENPORT INDEPENDENT TELE-
PHONE CO.

By A. T. WEST,
President."

That thereafter the defendant, pursuant to the terms of said offer and acceptance, appointed H. J. Tinkham as its engineer to act with A. T. West, the president of the plaintiff corporation, in making an appraisement of the reproduction value of the property of plaintiff for the purpose of fixing the price to be paid by the defendant therefor, and the said appraisers, at large expense to the plaintiff, examined the said property and, on the 5th day of October, 1914, fixed the said reproduction value at thirty-four thousand six hundred twenty-three and no/100 dollars (\$34,623.00), by a writing in words and figures as follows:

"Price agreed upon as reproduction cost of Davenport Ind. Tel. Co. property, \$34,623.00.

H. J. TINKHAM.

A. T. WEST."

Spokane, Wn., Oct. 5th.

IV.

That the said contract, after the said appraisement, was in part performed by the delivering by plaintiff to the defendant of approximately five hundred and twenty-five telephone poles, some with cross-arms, being a part of the property belonging to plaintiff's system and included in the property appraised as hereinbefore alleged.

V.

That plaintiff is in possession of and is the legal owner of all the property before described and belonging to its said telephone system, and can make good and indefeasible title thereto and has repeatedly offered the defendant, since the said appraisement was [5] made, to make title to it by good and sufficient conveyance, of all the property belonging to said system, or of such part thereof as defendant may declare itself lawfully entitled to acquire, and has demanded of it that it receive such conveyance and pay the plaintiff the purchase price as fixed by the said appraisers, but the said defendant has refused and ever since has refused to accept a conveyance to said property or to pay to the plaintiff the purchase price thereof.

VI.

That the defendant as an excuse for the breach of the said contract pretends that it is precluded by the anti-trust laws of the United States from acquiring any part of the property belonging to the plaintiff's system, and that its contract so to do was and is contrary to the said laws and not binding on it, but plaintiff alleges the fact to be that none of the telephone lines belonging to it come in competition with any telephone lines belonging to the defendant, except the toll line before described extending from Davenport, Washington, to Spokane, Washington, and that the right to acquire such line was discussed between plaintiff and defendant prior to its offer of June 20th, 1914, and that the status of the said line and the want of ability of the defendant to lawfully ac-

quire it, if indeed there be such inability, was as well known to it then as it is now. Plaintiff further alleges that none of the telephone lines belonging to it, except the said toll line, come in competition with any telephone lines operated by the defendant under lease or otherwise, except that defendant connects its line at Davenport with the telephone lines of Farm and City Telephone Company, a copartnership, and a competitor of plaintiff in Lincoln County, under an agreement revocable by it at any time on thirty days' notice.

VII.

That the value of the said telephone plant is dependant largely on its continued maintenance and operation as a going concern, [6] and defendant has paid and expended approximately two hundred dollars (\$200.00) per month over and above the receipts of the system since the 5th day of October, 1914, in such maintenance and operation, and will be required to expend a like sum monthly until the defendant, under and pursuant to the terms of its said contract, takes said system over, which said sums of money constitute a fair charge on the said property to be paid by defendant to plaintiff.

VIII.

That the plaintiff is still ready, willing and able to make title to all or any part of the properties belonging to its said system, and now tenders, whenever the said defendant shall elect the part of the properties of said system it is willing to receive, or in default of such election, on the judgment of this Court determining that the defendant may lawfully

acquire from plaintiff any part of, or all of, the properties of its said system, to deposit in the registry of this court for defendant, in accordance with said judgment, good and sufficient bills of sale and deeds of conveyance, vesting in and assuring to defendant the title and possession of said properties.

WHEREFORE, Plaintiff prays judgment that the defendant be required to specifically perform its said contract by paying into the registry of this court for the benefit of plaintiff, within a time to be fixed by the Court, the sum of thirty-four thousand six hundred and twenty-three dollars (\$34,623.00); and the further sum as the Court may find to be due plaintiff for maintenance and operation of the system as in this bill described; that the Court fix and determine the properties which defendant may lawfully acquire from the plaintiff, under the said contract, and that upon the failure of defendant to pay into the registry of the court the sums of money aforesaid, that the Court order the said properties to be sold under and in accordance with the practice of the court, for the benefit of plaintiff; and that plaintiff have a deficiency judgment for any sum [7] or amount due it over and above the sum realized from the sale of said property, and for such other and further relief as to the Court shall seem meet and equitable.

(Signed) TURNER & GERAGHTY,
GEORGE TURNER,
Attorneys for Plaintiff.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washing-

ton, January 26, 1915. W. H. Hare, Clerk. By
S. M. Russell, Deputy. [8]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Answer.

For answer to the bill of complaint of the plaintiff
in the above-entitled cause, the defendant alleges as
follows:

1.

Admits the allegations contained in paragraph 1
of the complaint.

2.

In respect to paragraph 2 of the complaint, admits
that on June 20, 1914, the plaintiff was in possession
and in operation of a telephone system in Lincoln
County, in the State of Washington, consisting of
approximately 300 miles of telephone wires strung
on poles in said county and reaching and serving the
towns of Davenport, Reardan and Peach in said
county, and also a local exchange in Davenport con-
sisting of wires and poles therein, the same being

connected with the said suburban lines described above; but denies that said system reached or served any other towns or communities in said county except Davenport, Reardan and Peach, and denies that the plaintiff was the owner of the local exchange in Davenport, or any part thereof, or had any franchise, license or permit authorizing it to operate a telephone exchange in said town or in any other town or community in said county, or to do any telephone business in any of said towns or communities.

Defendant admits that on said date the plaintiff was in [9] possession of a large number of telephone poles, cross-arms, insulators and other material usually kept on hand by telephone companies, of the value of about \$3,500, and was also in possession of storage batteries in duplicate, motor-generating charging set, with usual power board equipment, modern common battery switchboard, harmonic converters in duplicate, 160 telephone instruments in use by customers, and of other property ordinarily in use in a telephone system; but it has no knowledge as to plaintiff's ownership thereof, except that the defendant alleges that it was not the owner of any part of said property which was connected with or formed any part of the local exchange in Davenport.

Defendant admits that plaintiff was in possession of a telephone line extending from Davenport, in Lincoln County, to the City of Spokane, in Spokane County, which was used as a toll line for connection with the City of Spokane and other towns in eastern Washington and in northern Idaho by patrons of

the telephone exchanges at Davenport and Reardan, and other persons doing business in various points in Lincoln County.

Defendant admits that the wires referred to in said paragraph 2 were carried on poles equipped with cross-arms and insulators, some of said poles being set in the public highways of Lincoln County and Spokane County, and some of said poles being set upon land owned by private individuals; but defendant denies that the plaintiff had any grants of easement from such private individuals for the maintenance of said lines on their premises, and denies any knowledge or information sufficient to form a belief as to whether the plaintiff ever complied with the laws of the State of Washington in respect to the locating and maintaining of telephone poles on public highways, and defendant denies that the plaintiff owned, held or possessed any public or private easements for the maintenance of said telephone lines.

[10]

3.

In respect to paragraph 3 of the bill of complaint, defendant denies that it made to the plaintiff any offer in writing or otherwise to purchase its telephone system, or any part thereof, but admits that on or about June 20, 1914, its president signed and delivered to one A. T. West a letter or paper writing, a copy of which is set out in paragraph 3 of the complaint, and admits that some time later, and in the month of August, 1914, defendant received from said West a letter, a copy of which is set out in paragraph 3 of the complaint.

Defendant admits that before the title to said property had been examined by its attorneys, and before the validity of said paper writing had been considered or passed upon by defendant or its attorneys, it requested H. J. Tinkham, one of its employees, to act with Mr. West in making an appraisement of the property which the plaintiff claimed to own, and that such appraisement was made without expense to the plaintiff, and that said West and said Tinkham signed a paper writing in relation thereto, a copy of which is set out in paragraph 3 of the complaint.

Defendant further alleges in respect to the paper writing dated June 20, 1914, that the same was executed and delivered by the president of the defendant without any consideration of any kind or character being given therefor, and that the same did not constitute any contract on the part of this defendant, and was void and unenforceable for that reason, and also that that part thereof referring to the purchase of certain property was void and unenforceable because it was in violation of an Act of Congress of the United States, and of the Statute of Frauds of this State, as is hereinafter more fully alleged.

4.

In respect to paragraph 4 of the complaint, this defendant alleges that it is not true that the said alleged contract, after [11] the said alleged appraisement or at any other time, was in part or at all performed by the delivering by plaintiff to the defendant of approximately 525 telephone poles, or

any telephone poles, or by the delivery of any property or in any other manner. That the facts in relation to said matter are as follows: In the latter part of October, 1914, there was a conversation between H. J. Tinkham, Division Superintendent of Plant of the defendant, at Spokane, and said A. T. West, in relation to the defendant purchasing certain poles that said West or the plaintiff claimed to own, and the understanding between the parties in relation thereto was reduced to writing and is set forth in a letter written by said Tinkham to said West, dated October 31, 1914, which, omitting the address, is as follows: "Confirming our understanding relative to the purchase of poles from stock at Davenport, and also the removal and use of the pole lead between the State road and Cheney; will you kindly confirm our understanding if this will be satisfactory to you. The understanding is that in the event that the sale of the supplies and plant as agreed upon originally between this company and you is not for some reason carried out, that we will pay you for the poles we have and will take from stock a fair market price, and that we will pay you for the poles between Cheney and the State road a price equal to the reproduction cost, new, of same, the unit cost being as agreed upon in the original inventory. Will you kindly acknowledge this understanding. Yours truly, H. J. Tinkham, Division Superintendent of Plant."

On November 5, 1914, said West wrote a letter to Mr. Tinkham in relation to this matter, which, omitting the address, is: "Referring to your letter of

the 31st ultimo, the arrangement outlined is entirely satisfactory in so far as it refers to poles taken or to be taken from the yard at Davenport, but in reference to the poles between Cheney and the State road, I should like the option of requiring you to replace with new poles of the same class and fitted [12] with the same character of fixtures, etc., such poles as you remove, in the event that the general sale of plant and supplies now pending should not be consummated. With this understanding there is no objection to your removing the poles as required. Yours truly, Davenport Independent Telephone Company. A. T. West, President." Under this agreement defendant took certain poles from stock of the value of \$751.30, and certain poles between Cheney and the State road of the value of \$520.32, and before the commencement of this action defendant offered to said West to pay said amounts, together with certain expenses for loading, which said West claimed defendant should pay, amounting to about \$40.00, but said West refused to accept such payment.

5.

In respect to paragraph 5 of the complaint, the defendant denies that the plaintiff is the owner of all the property described in the complaint, or of any property except the toll lines referred to in paragraph 2 hereof, and denies that the plaintiff can make good, indefeasible or marketable title to any other property than said toll lines, and that as to such toll lines, defendant denies that plaintiff has any easements, public or private, for the mainte-

nance thereof; and denies that the plaintiff has repeatedly, or at all, offered to the defendant to make title to it by good or sufficient conveyance of all or any of the said property; but admits that said West has stated to the defendant that the plaintiff would execute an instrument purporting to be a deed of conveyance of all the said property, or any part thereof, that the defendant might desire conveyance of and deliver such instrument upon being paid the sum of \$34,623.00, which sum said West has demanded that the defendant should pay to him, and the defendant admits that it has refused to accept the delivery of such an instrument and has refused to pay said sum of \$34,623.00.

6.

In respect to paragraph 6 of the complaint, defendant admits [13] that it has stated to said West that it is precluded by the anti-trust laws of the United States from acquiring said property, but denies that it has made that statement as an excuse for the breach of said contract, and denies that there is or ever was any contract between the defendant and the plaintiff, or that it has broken the same in any manner whatsoever.

Said defendant admits that it has stated to said West that said paper writing of date of June 20, 1914, was not a contract, and that subdivision 2 thereof was, as defendant has been advised by its attorneys, unenforceable under the anti-trust laws of the United States, and that the title to the property which said West claimed to belong to the plaintiff was not acceptable to the attorneys for the de-

fendant, but that the defendant would make a contract with the plaintiff as is provided by paragraph 1 of said paper writing of June 20, 1914.

Defendant denies that none of the telephone lines which the plaintiff asserts belong to it, and which are referred to in said paper writing of June 20, 1914, are or were in competition with any of the telephone lines belonging to the defendant, except the toll line extending from Davenport to Spokane; and defendant alleges in respect thereto that the competition between the said telephone lines will be in a subsequent paragraph hereof more fully set forth and described.

Defendant denies that the right to acquire such line was discussed between the plaintiff and the defendant prior to the signing of the paper writing of June 20, 1914, and denies that the status of said line, or the want of ability of the defendant to lawfully acquire it, or the want of ability of the plaintiff to lawfully convey it, was as well known to it then as now, and defendant alleges in respect thereto that the defendant was not fully advised in respect to the status, condition, location or business of said lines on June [14] 20, 1914, or at any time theretofore, and did not at said time desire to purchase or acquire the same, and executed and delivered to said West said paper writing on said date at his instance and request, and the same was executed and delivered without any lawful consideration of any kind or character.

In respect to the last sentence of paragraph 6 of the complaint, defendant alleges that the Farm &

City Telephone Company referred to now owns and operates, and has for many years owned and operated, a telephone exchange at Davenport in said Lincoln county and also a telephone exchange at Reardan in said county, together with telephone lines radiating from said towns in different directions for many miles in Lincoln County, which telephone lines and system cover the same territory as that which it is alleged in the complaint is covered by the telephone system which the plaintiff alleges itself to be in possession and operation of, and said Farm & City Telephone Company also covers other territory and serves the public in other localities in which the telephone system which the plaintiff claims to own is not and never has been in operation. That said system of the Farm & City Telephone Company was in operation for many years before the incorporation of the plaintiff, and before the construction of any of said telephone lines which the plaintiff now claims to own; that said Farm & City Telephone Company is a sub-licensee of this defendant, operating under a contract whereby its system is connected with the telephone system of this defendant, and under which the patrons of the Farm & City Telephone Company may not only have telephonic communication over the lines of this defendant to the City of Spokane and the inhabitants thereof, and to other parts of Eastern Washington, but also to the City of Coeur d'Alene and to nearly all of the various towns, cities and communities of the State of Idaho in the northern part thereof, and such business and telephonic communication was daily had and held both

from the State of Washington into the State of Idaho, and from the State of Idaho into [15] the State of Washington, by the inhabitants of the respective States, one with the other, on June 20, 1914, and for many years theretofore, and ever since.

That the telephone line and system which the plaintiff claims to own or operate was on June 20, 1914, and had been for some time theretofore connected with an exchange in the City of Spokane, owned by the Home Telephone Company of Spokane, referred to in paragraph 1 of said paper writing of June 20, 1914, and through that exchange, with the toll lines of the Interstate Telephone Company, Limited, which operated between eastern Washington and northern Idaho in competition with the lines of this defendant, and telephonic communication was had and held between the citizens and inhabitants of the State of Washington and the citizens and inhabitants of the State of Idaho through and over the property claimed to be owned by this plaintiff, and said long distance toll line of the Interstate Telephone Company, Limited, and the same constituted interstate commerce in competition with the interstate commerce business of this defendant.

And defendant denies each and every other allegation in said paragraph 6 not hereinabove expressly admitted.

7.

In respect to paragraph 7 of the complaint, the defendant denies that the value of the telephone plant which plaintiff claims to own is largely dependent on its continued maintenance and operation as a

going concern, admitting, however, that the value of every telephone plant is dependent to same extent upon its maintenance; and defendant denies that it has paid or expended any sum at any time, in either maintenance or operation of said telephone line, plant or system.

As to whether plaintiff has paid or expended any sum in maintenance or operation over and above the receipts of the system, or will be required to expend any sum in the future for such maintenance [16] and operation over and above the receipts of the system, defendant has no knowledge or information sufficient to form a belief, except that the said West has repeatedly stated to the defendant that said telephone lines or system was making a profit, over and above maintenance and operation and all expenses connected therewith, of the sum of \$150 per month.

Defendant denies that \$200 per month, or any other sum, constitutes a fair charge on the property to be paid by the defendant to the plaintiff, or that the defendant should pay to the plaintiff any sum whatsoever on account of the matters and things referred to in paragraph 7 of the complaint.

8.

In respect to paragraph 8 of the complaint, the defendant denies that the plaintiff is able to make title to the properties described in the complaint, and each and every other allegation therein contained.

II.

For further answer and by way of defense, defendant alleges as follows:

1.

That said paper writing of date of June 20, 1914, referred to in paragraph 3 of the complaint, together with said paper writing of August 10, 1914, referred to in the same paragraph, do not constitute any contract between the parties hereto, and that there never was any valuable or lawful consideration therefor.

2.

That the attorneys for the defendant have examined the title to the properties referred to in said paper writings, and that such title is not acceptable to said attorneys and they have so advised this defendant, and that as a matter of fact the said plaintiff has not merchantable title to said properties, and especially to the properties constituting the Davenport exchange, and has not even a [17] franchise or permit to operate an exchange in the town of Davenport.

3.

That on June 20, 1914, and for many years theretofore, and ever since, the defendant has been engaged in interstate commerce, in telephonic communication, between the States of Idaho and Washington, as well as between other States, and has owned, controlled and operated telephone lines between nearly all of the cities and towns in the State of Idaho in the northern part thereof, and nearly all of the cities and towns in the State of Washington, whereby the people residing or being in one State may have and do communicate telephonically through the lines thus operated by this defendant

with the people residing or being in the other States.

4.

That on June 20, 1914, and for some time theretofore, and ever since, the toll lines of the plaintiff referred to in the complaint, extending from Davenport and Reardan and other communities in Lincoln County, Washington, to Spokane, Washington, were connected telephonically with the lines of a system which was operating in competition with the telephone lines and system of this defendant between eastern Washington and the northern part of the State of Idaho, which system belonged to the Interstate Telephone Company, Limited, and the Home Telephone Company of Spokane, and there was a contract between the plaintiff and said other companies providing for such connection and the continuation thereof, and by virtue thereof the plaintiff was engaged in interstate commerce in transmitting telephone messages and communications between various points in the State of Washington and the said various points in the State of Idaho, whereby those resident or being in the State of Idaho could and did talk over the said lines operated by the plaintiff with those resident or being in the State of Washington, and conversely.

5.

That in July, 1913, the United States Government brought an [18] action in the District Court for the State of Oregon against this defendant and other companies, for the purpose, among other things, of preventing this defendant from acquiring the property of the Interstate Telephone Company, Limited,

referred to above, and the property of the Home Telephone Company of Spokane, upon the ground that such acquisition would be in violation of an act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," being an act passed on July 2, 1890, and published in 26 Statutes at Large, at page 209, and commonly known as the "Sherman Anti-Trust Act"; and in said action, prior to June 20, 1914, a decree was entered perpetually restraining and enjoining this defendant from acquiring said properties, with the qualification that if the local authorities of the City of Spokane should decide in favor of a consolidation of the two exchanges in the City of Spokane, to wit, the exchange of the Home Telephone Company of Spokane mentioned above and the exchange owned by this defendant, then that said decree might be modified to permit the consolidation of said exchanges only, but with the proviso that the Interstate Telephone Company, Limited, should be connected with and have the benefit of such consolidated exchanges, and said competition in interstate telephonic communication should be continued, all of which was well known to this plaintiff on June 20, 1914; that defendant at said time desired to have the said two exchanges in Spokane consolidated and expected to obtain the consent of the city authorities to such consolidation, as was then known to this plaintiff. That in order to protect the plaintiff in its connection with a local exchange in the City of Spokane, and thereby with the system of the Interstate Telephone Company, Limited, and to protect

it in its said Interstate business, this defendant agreed with Mr. A. T. West as set forth in paragraph 1 of said paper writing of June 20, 1914.

6.

Defendant further alleges in respect to said paper writing [19] of date June 20, 1914, that the telephone line or system described in the complaint was at said time and ever since has been of no value whatsoever to this defendant, being merely a duplication of the said plant owned or operated by this defendant on June 20, 1914, and ever since; and this defendant further alleges that the sale of the property referred to in said paper writing, or any part thereof, by the plaintiff to the defendant, would be in violation of the anti-trust laws of the United States, and especially of that certain Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," being the Act of July 2, 1890, commonly known as the "Sherman Anti-Trust Act," in that the same would be in restraint of trade or commerce in telephonic communication between the State of Washington and the State of Idaho, and would tend to monopolize such commerce, and would also be in violation of the decree in the suit brought by the United States Government against this defendant and others hereinbefore referred to, and said paper writing is void and unenforceable under the provisions of said statute. That at the time of signing the same by the president of this defendant, the real situation in relation thereto was not appreciated and understood by this defendant, and as soon as the matter was submitted to its counsel it

was advised by its counsel that said contract was void and unenforceable for the reasons above stated, among other reasons, and immediately thereafter this defendant notified said A. T. West of said fact.

7.

That said paper writings set forth in the complaint are also void and unenforceable under the Statute of Frauds of the State of Washington, in that: (a) said paper writing of date June 20, 1914, is not signed by the owner of said property; (b) that it does not contain a description of the property or of any property which could be lawfully sold to the defendant; (c) that it does not contain the price and terms of credit and conditions of sale; (d) that it does [20] not contain the full and essential terms of a contract.

8.

Defendant further alleges that this court is without jurisdiction in equity, and that this case is not one of equitable cognizance, but that the plaintiff has a full, complete and adequate remedy at law.

WHEREFORE, Defendant prays to be hence dismissed and have judgment for its costs and disbursements.

(Signed) POST, AVERY & HIGGINS,
F. T. POST,

Attorneys for Defendant.

State of California,

City and County of San Francisco,—ss.

G. E. McFarland, being duly sworn, deposes and says: That he is an officer, to wit, the president, of The Pacific Telephone and Telegraph Company, a

corporation, the defendant in the above-entitled action and named in the foregoing answer; that he is entirely familiar with the business of said corporation; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true; that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to those matters, that he believes it to be true.

(Signed) G. E. McFARLAND.

Subscribed and sworn to before me this 12th day of March, 1915.

[Seal] (Signed) FRANK L. OWEN,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsements]: Answer. Received copy of within answer this 15th day of March, 1915. (Signed) Turner & Geraghty, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, March 15, 1915, W. H. Hare, Clerk. By S. M. Russell, Deputy. [21]

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Opinion.

TURNER & GERAGHTY, for Plaintiff.

POST, AVERY & HIGGINS, for Defendant.

RUDKIN, District Judge.

This is a suit for the specific performance of a contract for the sale of certain telephone property. On the 20th day of June, 1914, the plaintiff was the owner, or at least claimed to be the owner, and was in possession of and operating a telephone system in Lincoln County, consisting of approximately three hundred miles of telephone wires strung on poles, reaching and serving the several towns and communities in the county, and also of a local exchange at Davenport, and a toll line extending from Davenport to the City of Spokane, together with certain supplies on hand and the customary and usual switchboards, batteries, and other accessories. On that date the defendant company addressed to the president of the plaintiff company the following communication:

“Confirming our conversation of to-day:

“1. In the event of the consolidation of the two exchanges now in Spokane, the Pacific Telephone & Telegraph Company agrees to make a contract with the Davenport Independent Telephone Company, giving the Davenport Company a connection with the consolidated exchange and through that exchange with the system of the Interstate Company under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane.

“2. In the event that the Davenport Company desires to sell its property to the Pacific Company and so notified the Pacific Company in writing *with* sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by [22] one of our engineers, representing this company, and in the event of your failure to agree with our representative, the value is to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.

“Our Mr. Hickman is authorized to take up with you any matters in this connection.”

On the 10th day of August, 1914, the plaintiff accepted the offer to purchase in the following communication:

“Please be advised that we desire to sell our property to you in accordance with conditions outlined in President McFarland’s letter of June 20th last, addressed to the writer.”

Thereafter H. J. Tinkham, an engineer appointed by and representing the defendant, and A. T. West, representing the plaintiff, made an appraisement of the reproduction value of the property for the purpose of fixing the selling price, and on the 5th day of October, 1914, such value was fixed at the sum of \$34,623.00, by a memorandum signed by the parties as follows:

“Price agreed upon as reproduction cost of Davenport Ind. Tel. Co. property \$34,623.00.

Spokane, Wn., Oct. 5th.

H. J. TINKHAM.

A. T. WEST.”

The plaintiff has offered to convey the property in conformity with this agreement at the price fixed by the appraisers, but the defendant refuses to accept the same or pay the purchase price.

While considerable testimony was taken at the hearing about the only controversy arose from the denial in the answer that certain poles and cross-arms were delivered to the defendant in part performance of the contract as alleged in the complaint. The testimony of the witness for the defendant on this point

is corroborated by the correspondence between the parties relating to the same subject matter; and that issue I must determine against the plaintiff.

The offer to purchase, the acceptance, the appraisement, the offer to convey and the refusal to accept the conveyance or pay the purchase price, are all admitted. The defendant contends that [23] the plaintiff has a plain, speedy and adequate remedy at law, and seeks to justify its refusal to carry out the contract on the following grounds:

1. Because of the Sherman Anti-Trust Act.
2. Because of a decree entered in the District Court of the United States for the District of Oregon in a suit which the United States was plaintiff and the present defendant and others were defendants; and
3. Because of the statute of frauds.

The defendant further contends that the plaintiff's title to the property is defective and that the title is not acceptable to the attorneys for the defendant as provided in the contract. Viewed from the standpoint of the plaintiff alone there would seem to be an adequate remedy at law by an action for damages, the measure of damages in such cases being the difference between the contract price and the fair market value of the property. True, there might be some difficulty in proving the market value, but that is an ever-present difficulty in all kinds of litigation. But viewed from the standpoint of the defendant, the remedy at law is plainly inadequate. The property, whether real or personal, is of a peculiar kind not obtainable in open market, and the defendant is entitled to the specific thing contracted for. Per-

formance has been decreed where the specific thing is desired by the plaintiff and cannot be duplicated; for the sale of unique or rare chattels, or chattels having a sentimental value; for the sale of ships, documents, patent rights and copyrights; for the sale of stock having no market value and not readily procurable; for the sale of annuities; debts; judgments; bonds and mortgages. 36 Cyc., et seq.

And if the defendant is entitled to specific performance the same measure of relief must be accorded to the plaintiff. In *Raymond v. San Gabriel Val. Land & Water Co.*, 53 Fed. 883, the Court said:

“A vendor of real estate, who has executed a title bond [24] conditioned for the conveyance of the land upon the payment of the price, has an election of remedies to recover the purchase money. He may sue therefor at law, or he may resort to equity for a specific performance of the contract by the vendee. Whenever the purchaser has the right to go into equity and compel the execution and delivery of a deed, the principle of mutuality gives the vendor the right to go into equity to compel the vendee to perform the contract on his part by paying the purchase money. This is an exception to the general rule that equity will decline jurisdiction of a suit for a money demand which could be recovered by an action at law. The exception is based on the established doctrine of equity that the right to a specific performance must be mutual, and that it must be enjoyed alike by both parties to every contract to which the jurisdic-

tion extends. In every case, therefore, where the vendee would have the right, by a suit in equity, to compel the execution and delivery of the deed by the vendor, the latter may, by a similar suit, enforce the obligation of the vendee to pay the purchase money."

In a few of the states, such as Massachusetts, where the general jurisdiction of equity is restricted by statute to cases where the legal remedy is adequate a more stringent rule prevails; but the equity practice in the courts of the United States usually conforms to the practice in the Court of Chancery in England and there the doctrine of mutuality is firmly established. I am therefore of opinion that plaintiff may properly invoke the jurisdiction of a court of equity.

The claim that the contract violates the Sherman Anti-Trust Act and the decree of the United States District Court for the District of Oregon is based on the following facts:

On the 10th day of August, 1911, the Washington Consolidated Telephone Company entered into a contract with the Interstate Telephone Company, Limited, and the Home Telephone & Telegraph Company of Spokane, under the terms of which the several companies agreed to interchange business so that messages originating on the lines of the Consolidated Company could be transmitted over the lines of the Interstate Company to various points in Eastern Washington and Northern Idaho. The contract was by its terms to continue in force for a period of ten years and thereafter until one year's written notice

of an intention to terminate it was given by either party to the other. The plaintiff company claims to have succeeded to the rights of the Consolidated Company under this contract, but [25] the other companies have refused to recognize that claim. A small amount of interstate business has been done by the plaintiff company over the lines of the Interstate Company as a matter of accommodation, however, the two companies dividing the tolls according to mileage. The volume of interstate business for the twenty-two months preceding the execution of the contract of sale averaged \$1.12 per month. There seems to have been no increase in the interstate business during that period and no prospect of an increase in the immediate future.

From the foregoing statement it seems apparent that the parties to the present contract did not as a matter of fact intend to monopolize or restrain interstate traffic, and it seems equally apparent that their contract does not have that effect as a matter of law, if the rule of reason still obtains. The amount of interstate business transacted in the past has been too insignificant and the possibilities for transacting such business in the future are too remote and too unpromising to bring the case within the prohibition of either the statute or the Oregon decree.

Cincinnati Packing Co. v. Bay, 200 U. S. 179.
Standard Oil Co. v. United States, 221 U. S. 1.
United States v. American Tobacco Co., 221 U. S. 106.

United States v. Union Pac. R. Co., 226 U. S., 61.
Anderson v. United States, 171 U. S. 615.

The only objection that can be urged against the

memorandum of sale is, the sufficiency of the description of the property which was the subject matter of the sale. The description is no doubt general, but that is not a valid objection if the subject matter of the contract can be identified from the description given. The parties here evidently fully understood the subject matter of their contract; their agents appointed to appraise the property found no difficulty in locating it from the description given; and in my opinion the description, though general, satisfies the requirements of the statute of frauds. [26]

Numerous exceptions have been taken to the title tendered by the plaintiff and the more important of these will now be considered. Title to a part of the property was acquired through a bankruptcy sale, and title to another part through a foreclosure sale. Objection is made to the title acquired through the bankruptcy sale on the ground that the bankruptcy court lost jurisdiction of the proceedings before the sale was ordered; on the ground of insufficiency of the description of the property in the bankruptcy proceedings; and on the ground that the trustee in bankruptcy purchased the property back from the purchaser at the bankruptcy sale soon after the bankruptcy sale took place. The record shows that the involuntary petition was filed on the 11th day of March, 1913, and that the adjudication was made on the 10th day of April following. On the 13th day of May, 1913, a stipulation signed by the attorneys for the petitioning creditors and the bankrupt to the effect that the proceedings should be dismissed on the ground and for the reason that the claims of the peti-

tioning creditors had that day been fully settled and satisfied was filed. No further proceedings appear to have been taken in the bankruptcy court until an *ex parte* order was made on the 23d day of October, 1913, directing the officers of the bankruptcy court to proceed with the administration of the estate. Attorneys for petitioning creditors in bankruptcy do not seem to realize that they have no control over the proceedings after the adjudication is made. The stipulation was never called to the attention of the Court and was wholly authorized and without force or effect. The order made in October simply required the officers of the bankruptcy court to proceed with the administration of the estate, a duty imposed by law without order or direction from the Court. There is no merit, therefore, in the claim that the Court lost jurisdiction by reason of the stipulation or otherwise. What has already been said as to the sufficiency of the description [27] contained in the memorandum of sale disposes of the objections to the sufficiency of the description in the bankruptcy proceedings. The fact that the trustee in bankruptcy repurchased the property from the purchaser at the bankruptcy sale soon after the bankruptcy sale was made does not affect the title at law or in equity, unless such repurchase was made in pursuance of an agreement entered into before the bankruptcy sale took place. The proof shows that such was not the case. I see no substantial objection, therefore, to the title acquired through the bankruptcy court.

One H. H. Reynolds was made a party to the fore-

closure proceeding in the State court under the general allegation that he claimed some right, title or interest in or to the mortgaged property which was subsequent and inferior to the lien of the mortgage. Reynolds was a nonresident of the State, was not served with process, and did not appear in the action. Notwithstanding his absence from the case, for some inscrutable reason, the State court attempted to adjudicate upon his rights and divest him of his interest in the property. The Court found in substance that Reynolds purchased the mortgaged property at receiver's sale; that the report of the receiver was filed and the sale confirmed on the 1st day of May, 1911; that Reynolds bought the property with full notice of the trust deed, for less than its actual value, and that his purchase was subject to the trust deed and burdened with the lien thereof. Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in this way. There was introduced in evidence at the trial, however, a bill of sale from Reynolds to the grantor in the trust deed bearing date May 8, 1911, and this bill of sale would divest him of any title acquired at the receiver's sale. It was suggested in argument that the finding above referred to was made on the 31st day of May, 1912, more than a year after the execution of the bill of sale, but the finding in favor of Reynolds, [28] as well as the finding against him, in a proceeding to which he was not a party, must go for naught. If there is any evidence in the record that Reynolds had an interest in the property at any time, there is likewise evidence that he conveyed that

interest at a later day and no evidence that he now has or claims such interest. Objection is also made that the franchises were not sold in the mode prescribed by law for that particular class of property. But I am of opinion that so long as the process in the hands of the sheriff was fair upon its face the question whether the sheriff performed his official duties or gave the notice prescribed by law does not concern the purchaser and that a judicial sale cannot be collaterally attacked in this way. This disposes of the principal objections urged against the title, and while there are unquestionably some irregularities I am of opinion that the title of the plaintiff is a marketable one, such as a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept. The memorandum contained a provision that the title should be acceptable to the attorneys for the defendant. No attorneys were mentioned and under such circumstances I do not think that the attorneys should be held to be final arbiters whose decision can only be impeached for fraud or mere capriciousness. I think the tender of a marketable title would satisfy the obligations of the contract, and I see no sufficient reason for holding that the defendant is not bound to accept the title and pay the purchase price in accordance with its promise. A decree of specific performance will therefore go as prayed.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington. July 29, 1915. W. H. Hare, Clerk. [29]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

First. That under the terms of the contract of sale described in the complaint there is due the plaintiff from the defendant the sum of thirty-four thousand six hundred and twenty-three dollars (\$34,623.00), with interest at the rate of six per cent per annum from the seventh day of June, A. D. 1915, the date of the trial of this cause, and that plaintiff is entitled to have the said contract specifically enforced against the defendant as prayed for in the bill of complaint, and, for the purpose of carrying out and enforcing said contract specifically, it is ordered:

(a) That plaintiff execute and lodge in the registry of this court, within ten days from the date of this decree, good and sufficient deed or deeds of conveyance, vesting in, and assuring to the defendant the title to the property described in the bill of complaint. For the purposes of said conveyance it shall be sufficient to describe the property as follows: A metallic telephone circuit extending from the city limits of the City of Spokane, Washington, to Davenport, Washington, consisting of B. B. telephone wire No. 12, upon cedar poles, the said main line from Spokane to Davenport being approximately forty miles in length; excepting that for a distance of approximately five miles west of Reardan the [30] circuit is supported under license by poles belonging to the West Crescent Farmers' Co-operative Telephone Company, of Reardon; also a telephone line connecting with said main line and running to Reardan, Washington; also a second circuit of copper clad wire between Spokane and Reardan, supported upon above-mentioned pole line; and further including telephone exchange at Davenport, Washington, and all connections and appliances therewith used and all wire, poles, brackets, arms, pins and insulators used in connection with said telephone exchange, all telephones installed and uninstalled and all supplies and equipment on hand; also one Ford automobile, manufacturer's No. 369,762; also the franchise to maintain a telephone system in the town of Davenport, the same having been granted by Ordinance No. 147, of the town of Davenport to the Local & Long Distance Telephone Company, and subse-

quently acquired by plaintiff herein; also franchise granted by the Board of County Commissioners of Lincoln County to the Washington Consolidated Telephone & Telegraph Company, and subsequently acquired by plaintiff; also rural lines owned by plaintiff extending in a westerly direction beyond Davenport approximately one-half mile, and another line running in a northerly direction from Davenport carrying twenty wires and extending approximately five miles, and then branching, one branch taking a westerly course to a point beyond the town of Egypt, approximately thirteen miles from Davenport, from which point to the Town of Lincoln poles and cross-arms are distributed along the route but not installed, the other branch running northerly to a point approximately fifteen miles from Davenport, together with small service laterals radiating from said lines; also rural lines extending southeasterly from Davenport approximately three miles; also a line of poles without wires extending from a point on the plaintiff's main line between Spokane and Davenport about five miles west of Spokane and extending along the county roadways to within approximately one mile of the town of Cheney, in Spokane County, Washington; [31] all stocks and supplies in the company's warerooms at Davenport; all office furniture, fixtures and supplies; all poles and cross-arms in the company's yards at Davenport and in the forest in Stevens County, Washington;—said above-described property, excepting the franchises referred to, being the property, and all of the property, specifically described and inventoried in the schedule introduced in evidence in this cause as Plaintiff's Ex-

hibit No. 2; to which shall be added the following general descriptive clause: "Together with all other property of every character and description, real, personal, or mixed, including public franchises, belonging to the Davenport Independent Telephone Company on the 5th day of October, A. D. 1914."

(b) That within twenty days after the said deed of conveyance shall have been lodged in the registry of the court, the defendant shall pay to the plaintiff, or pay into the registry of the court for the use and benefit of the plaintiff, in good and lawful money, thirty-four thousand six hundred and twenty-three dollars (\$34,623.00), with interest at the rate of six per cent per annum from the fifth day of June, A. D. 1915, together with the costs of this action, which costs, in case the money be paid into the registry of the court, shall include one per cent on the principal sum with interest as the clerk's fees for receiving, keeping and paying out the said sum in accordance with the provisions of this decree. Thereafter the said deed or deeds of conveyance shall be delivered to the said defendant and the said sum of money shall be delivered to the plaintiff.

(c) In default of payment by defendant of said sum of money within the time herein specified, it is ordered, adjudged and decreed that the property of the plaintiff, the Davenport Independent Telephone Company, be sold in accordance with the practice of this court, and that the proceeds of said sale, after deducting the cost of this suit and of said sale, be applied to the satisfaction of the sum due the plaintiff under its contract with the defendant, and [32] that plaintiff have a deficiency judgment for any

sum or amount due it under said contract over and above the sum realized from said sale. In the event of the sale of said property as in this paragraph provided, the deed of conveyance made by the plaintiff to the defendant and lodged in the registry of the court, shall be marked cancelled by the clerk of the court, and delivered to the plaintiff. The plaintiff has leave to apply to the court, after the time for the payment of the money by the defendant as herein provided shall have lapsed, for an order of sale of the property as an entirety, and for such other order in aid of said sale and of the execution of this decree, as may be in accordance with the rules and practice of this court.

Second. That plaintiff have judgment for its costs and disbursements in this action, taxed at ——— dollars.

Signed in open court, at Spokane, Washington, this 4th day of September, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Decree. Received copy of within decree this 1st day of September, A. D. 1915. (Signed) Post, Avery & Higgins, Attorneys for Defendant. Filed in the U. S. District Court for the Eastern District of Washington. September 4, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.
[33]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Statement of Facts.

BE IT REMEMBERED that the above-entitled cause came on regularly for hearing in the above-entitled court on June 7th, 1915, before the Honorable FRANK H. RUDKIN, Judge presiding; the plaintiff being represented by Turner & Geraghty, and the defendant being represented by Post, Avery & Higgins. Counsel for both sides announced themselves ready for trial.

[Testimony of A. T. West, for Plaintiff.]

A. T. WEST, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

My name is A. T. West. I am president of the Davenport Independent Telephone Company; was president at the time letter set out in the bill of complaint was addressed to me by Mr. McFarland. Mr. McFarland knew my relation to the Davenport Independent Telephone Company at that time. He signed that letter as president of The Pacific Tele-

(Testimony of A. T. West.)

phone and Telegraph Company. I have the minutes of the Davenport Independent Telephone Company showing my authorization to sign my letter dated August 10, 1914, and addressed to Mr. McFarland. The minutes of the Board of Trustees are dated June 4, 1914. They recite the offer of Mr. McFarland under date of May 20, 1914. The proceedings were had after the receipt of a letter from Mr. McFarland.

Mr. TURNER.—We offer this minute dated as of the 4th day of June, 1914. [34]

Mr. POST.—I object because it is immaterial, irrelevant and incompetent.

The WITNESS.—(Continuing.) I was present at that meeting. The resolutions were passed at that time. They are the entire minutes of the company kept from the date of its organization, approving its by-laws. I know that the meeting was held after the receipt of Mr. McFarland's letter. It would be difficult to say the exact date.

Mr. TURNER.—I offer this.

Mr. POST.—I have offered my objections.

The COURT.—It will be admitted.

Mr. TURNER.—(Reading:) "The chair submitted an offer in writing under date of May 20th, 1914, from President McFarland on behalf of the Pacific Telephone and Telegraph Company to purchase the property of this company or such portion of it as they could lawfully acquire, saying therefor the appraised value of the plant as determined by the reproduction cost new, provided the acceptance

(Testimony of A. T. West.)

of the offer be filed with them on or before sixty days from the date thereof ; Mr. Armin offered the following and moved its adoption: Resolved, that the offer by President McFarland on behalf of the Pacific Telephone and Telegraph Company be accepted and the president is hereby directed to make formal acceptance of same prior to the expiration of the sixty day limit and also arrange for the appraisal in accordance with the conditions set forth in the offer. Resolution adopted by the following vote: Ayes, Armin, Cornell, West; nays, none."

The WITNESS.—(Resuming.) The gentlemen named in the resolution are the trustees. There are two others, Mrs. West and Mrs. Armin. They were seldom present. The members of the board of trustees own all of the stock. Mr. Armin has Mrs. Armin's proxy, I have Mrs. West's. We three are the entire organization. Subsequent to the acceptance of Mr. McFarland's proposition, Mr. [35] Tinkham and myself made an appraisement and inventory of the property.

(The inventory was offered in evidence and objection was made because it was immaterial and unnecessary. It was marked Plaintiff's Exhibit #2, and showed that the total appraisement was \$34,623.00.)

The WITNESS.—(Resuming.) The inventory embraces the exchange at Davenport of the Davenport Independent Telephone Company, including poles, lines and wires about the city, together with all office equipment, switchboard, power plant and

(Testimony of A. T. West.)

such appliances as are usual and customary in the operation of a telephone plant, also suburban line built in the country adjacent to Davenport and connected with the Davenport exchange, also toll line from Davenport to the city limits of Spokane, also supplies such as construction materials that were actually on hand, and a part of the property of the Davenport Company at the time of making the inventory and appraisal. It includes no mention of franchises, good will or other property than the property of the company. It includes only the physical property. The property is situated at Davenport in Lincoln County, except two or three hundred poles that are in the woods in Stevens County, and except that part of the toll line in Spokane County. The poles in Stevens County were no part of the system. I was in possession of and maintaining a telephone exchange at Davenport at that time. The appurtenances of the telephone exchange were telephones, lines, switchboard, battery equipment. There was nothing attached to realty excepting the house in which we managed the exchange and the poles that were set throughout the city.

(Certified copy of Ordinance No. 147 of the City of Davenport, having attached thereto the following resolution of the city council of Davenport, was admitted as Plaintiff's Exhibit #3, as follows:

**[Plaintiff's Exhibit No. 3—(Part of) Resolution of
City Council of Davenport.]**

“Be it resolved that the transfer through mortgage foreclosure [36] and bills of sale running to Davenport Independent Telephone Company, a Washington corporation, of a franchise granted to the Local and Long Distance Telephone Company by the Davenport Council, Ordinance No. 147 is hereby ratified and approved. Passed at a regular meeting November 5, 1914, on motion of Mr. Denson, seconded by Mr. Chilton.”)

Mr. TURNER.—I understood from you the other day, Mr. West, and wish you to state to the Court whether it is true or not, before you got the council to pass this resolution, you submitted it to Mr. Post to satisfy his desire that your company should be invested with a franchise for a telephone exchange.

Mr. POST.—He has two questions in one, and part of it is objectionable.

Mr. TURNER.—Before you presented this last resolution to the council at Davenport, did you submit it to Mr. Post to see whether it was satisfactory to him, and did he say it was satisfactory?

A. Yes, sir.

(A bill of sale from H. H. Reynolds to Washington Consolidated Telephone & Telegraph Company, No. 94,848, dated May 8, 1911, was admitted as Plaintiff's Exhibit #4. This was read into the record. This purports to convey all the property and assets belonging to H. H. Reynolds in the Counties of Lincoln, Grant and Spokane, together with all the appliances, franchises, contracts and agree-

ments of every kind and nature, including the contract with the Interstate Telephone Company, the agreement with the Gunning line and Reardan, franchises to the Davenport and Wilbur exchanges in Lincoln County, and Ephrata and Soap Lake in Grant County, and including all the poles, lines, wires and fixtures of every kind and nature and character in all of the counties aforesaid, exchanges and exchange apparatus and machinery in Mondovia, Davenport and Soap Lake and elsewhere, including the toll line from Davenport to Spokane, the toll line from Adrian to Ephrata and [37] anywhere else, and all materials, whether in use or otherwise, in said counties, and all lateral lines, supplies, materials and tools at Moran Prairie, Davenport, Reardan and Spokane.)

(The summons and complaint in the case in the Superior Court for the State of Washington, in and for the County of Spokane, entitled "The Washington Trust Company, a Corporation, vs. Local and Long Distance Telephone Company, a Corporation," were offered in evidence, and admitted as Plaintiff's Exhibit #5.)

The sheriff's return of sale of personal property under a mortgage foreclosure in the case last above mentioned was admitted in evidence as Plaintiff's Exhibit #6. This had attached to it an order of sale and decree in the mortgage foreclosure proceedings.

The findings of fact and conclusions of law in the same case were offered in evidence and marked

(Testimony of A. T. West.)

Plaintiff's Exhibit #7.

A bill of sale from W. B. Brockman, Sheriff of Lincoln County, Washington, for the consideration of \$1,500.00 to the Washington Trust Company, was admitted and marked Plaintiff's Exhibit #8. This purported to convey all property of every nature, kind and description, and wheresoever situated, including real and personal, owned by the Local & Long Distance Telephone Company, a corporation, on May 24, 1910, or acquired by said company at any time after said date, and describes in detail the lines running through Lincoln, Grant and Spokane counties above set forth.

A bill of sale from the Washington Trust Company to C. N. Thomas, Trustee, was admitted and marked Plaintiff's Exhibit #9. This was for the consideration of \$1,762.15, and purported to convey all right, title and interest of every nature, kind and description acquired by the first party to a certain bill of sale of W. B. Brockman, Sheriff of Lincoln County, conveying property described in sheriff's bill of sale.

A bill of sale from C. N. Thomas, trustee, to the Davenport Independent Telephone Company, dated August 11, 1913, was [38] admitted in evidence as Plaintiff's Exhibit #10, and purported to convey to the Davenport Independent Telephone Company the property described in the Sheriff's bill of sale above mentioned.)

The WITNESS.—(Resuming.) The bills of sale from the Washington Trust Company to C. N. Thomas

(Testimony of A. T. West.)

and from C. N. Thomas to the Davenport Independent Telephone Company were never placed on record; they were in the office of defendant's attorneys for three months. The bill of sale of Mr. Thomas to the Davenport Independent Telephone Company was negotiated by me. The signature on said bill of sale is that of Mr. Thomas. The Davenport Independent Telephone Company entered into possession of the property described in the bill of sale from Mr. Thomas. The property is embraced in contract of sale to the Pacific Telephone and Telegraph Company. All properties listed in the bill of sale were not appraised by Mr. Tinkham and me. The bills of sale covered more property than was found. I never took possession of any property in Grant County. That constituted no part of the property of the Davenport Independent Telephone Company.

Mr. TURNER.—I offer in evidence the franchise granted by the Board of County Commissioners of Lincoln County to the Washington Consolidated Telephone & Telegraph Company, covering all of the streets and roads of Lincoln County, not including the City of Davenport, over which this plaintiff corporation maintained its lines.

Mr. POST.—I object to this for the reason that under the record submitted by Senator Turner of this foreclosure proceeding, there has been no compliance with the law as to the filing of the franchise. They have to give different notice under the statute, and there is no proof here that such notice was given.

(Testimony of A. T. West.)

(The franchise was marked Plaintiff's Exhibit #11, but the court did not pass upon the admissibility.)

The WITNESS.—(Resuming.) The personal property specified [39] in the complaint in this case was acquired in the foreclosure proceedings from the Local & Long Distance Telephone Company. Personal property was in possession of my company from that time until now. It was listed in the inventory taken by me and Mr. Tinkham.

Mr. TURNER.—I want to offer the petition in bankruptcy in this case, the adjudication of bankruptcy and order of sale.

The COURT.—Who was the bankrupt in that case?

Mr. TURNER.—The Washington Consolidated Telephone and Telegraph Company.

The COURT.—That was the defendant in the foreclosure, also, was it?

Mr. TURNER.—Yes. I do not suppose it is necessary to read this.

The COURT.—I presume the whole thing may be considered in evidence and the parties can use such parts as they desire.

Mr. TURNER.—We offer those particular parts of this record for the inspection of the Court. We now offer the bill of sale from the trustee in bankruptcy to W. W. Smith, purchaser.

Mr. POST.—Who was the trustee in bankruptcy?

The WITNESS.—A. T. West.

Mr. TURNER.—We offer a bill of sale from Smith,

(Testimony of A. T. West.)

the purchaser, to the Davenport Independent Telephone Company.

Mr. POST.—Kindly give us the date of the bill of sale from West to Smith.

Mr. TURNER.—The 12th day of May, 1913, and the bill of sale to the Davenport Independent Telephone Company was the 1st day of June, 1914.

(The referee's record in bankruptcy was not marked as an exhibit, but the bill of sale from the trustee in bankruptcy to Smith was marked Plaintiff's Exhibit #12, and the bill of sale from W. W. Smith to Davenport Independent Telephone Company was marked Plaintiff's Exhibit #13.) [40]

The WITNESS.—(Resuming.) The particular property turned over under the bill of sale from the trustee in bankruptcy consisted of a large quantity of supplies, chiefly of several hundred poles piled on the railroad right-of-way near the depot at Davenport, some construction hardware in the warehouse in the City of Davenport. The exact inventory shows in the inventory made by Mr. Tinkham and myself. There was a line fifteen or sixteen miles north of Davenport together with additional poles and cross-arms distributed along the highways for the purpose of extending lines that had already been completed, and also a partially completed toll line from Sunset Boulevard to the city limits of Cheney; that was in Spokane County. All the other property was located in Lincoln County, with the exception of two or three hundred poles in the woods in Stevens County. These lines, with the exception

(Testimony of A. T. West.)

of the Cheney branch, are in Lincoln County, and north of Davenport. The property received by that bill of sale constituted the property belonging to the plaintiff here at the time of the receipt of the offer from the defendant and the acceptance of the same by the plaintiff. The company owns no property other than this telephone property.

Mr. TURNER.—It may be necessary to refer to other parts of this record.

The COURT.—The entire record will be in evidence for use as far as may be necessary.

Mr. TURNER.—And not to be included in any appellate proceedings unless all of it is really used.

The COURT.—Yes.

The WITNESS.—(Resuming.) Only two poles of our line were on any private property in the City of Davenport. Outside of Davenport, on the toll line between Davenport and Spokane, there are three instances where the line goes on private property, which came about through the road right-of-way being changed. The line [41] was originally built upon the highway, and when the road was changed, it threw the poles on privately owned property. In one place there are sixteen poles on the land. That would mean about half a mile. In another place there are six poles on privately owned land. In another place there are seven poles upon privately owned land. At one place north of Davenport the line goes across private land, and there are three or four poles there.

Mr. TURNER.—How much would it cost to

(Testimony of A. T. West.)

change these lines to make them run on the road as changed?

Mr. POST.—That is objected to as wholly immaterial.

The COURT.—I will receive it subject to your objection.

The WITNESS.—(Continuing.) In cases of the toll line, one hundred dollars would move the line to the road. In Davenport it would cost one hundred and fifty dollars to make the change. The line has been maintained there two and a half years and there has been no objection to it. As to the lines outside of Davenport, Mr. Todd objected; I gave him \$5.00 and he was satisfied. No others objected. After the contract was entered into with the defendant, the defendant took several carloads of poles from Davenport and removed some from the extension between Sunset Boulevard and Cheney. I did not know anything about the poles being taken from the line between Sunset Boulevard and Cheney until after they had been taken. When Mr. Tinkham and myself were at Davenport looking over the property, he stated that he had occasion or would likely have occasion to use some of these poles. They were 25-foot poles and his company does not use many of that length. And something was said with reference to whether or not I would have any objections to his using them. I said, no, they could take them at any time. The next I knew was that a young man came to Davenport to get a car or two of poles. He took at least a carload of the poles

(Testimony of A. T. West.)

and shipped them. Subsequently some letters passed between Mr. Tinkham and myself. Before the letters were [42] written, Mr. Tinkham explained to me that he had taken those poles on his own initiative, and he asked me if I would give him a letter indicating that in the event that for any reason this contract was not consummated, he could simply be held for the price of the poles. I told him I would do that. After the letters came I did not answer right away. Later I received a letter bearing the date of September 25th. That was the first letter. This correspondence took place after the young man got the poles. Tinkham called up and urged me to write a letter. I told him I would write such a letter, and I did. There was a second delivery after these letters. Mr. Tinkham stated that he wanted more poles from Davenport; that he had taken those from the road toward Cheney. I don't know just when those were taken, but the first information I had was when he announced the fact that he had taken them. They were gotten before the letters passed. He wanted me to include those in the letters, and I told him I was willing to do that with the provision that in addition I might, instead of taking an appraised price in case of settlement between him and me, that he would replace the poles if I so desired. I am now stating what was in the conversation. He called me up and told me he had taken the poles, and asked me to cover them in the letter the same way, and I told him I would do that excepting there was a little difference; I would

want to make a reservation that they were at my option to replace the poles set in the ground. I wrote a letter with that stipulation in it.

(A letter from Mr. McFarland, president, to Mr. West, dated December 15, 1914, was admitted in evidence as Plaintiff's Exhibit #14.)

Mr. TURNER.—I also have a letter from Mr. Kingsbury, president of the American Telephone & Telegraph Company.

Mr. POST.—This letter refers to a letter received from Mr. West. Have you got a copy of that?

Mr. TURNER.—Yes, we have a copy of that and I will offer [43] the two in evidence.

Mr. POST.—If your Honor please, I object to correspondence between Mr. West and Kingsbury, who is not an officer in any way of the Pacific Telephone and Telegraph Company; he is vice-president of the American Telephone & Telegraph Company, but he is not an officer of the Pacific Telephone & Telegraph Company. I don't see how anything he wrote can be in any way binding upon the Pacific Telephone and Telegraph Company.

THE COURT.—In an equity case it can do no harm, but the court cannot take judicial notice of the relation of these different companies to each other.

(Mr. Turner then read into the record copy of letter from West to Kingsbury, dated December 6, 1914, and an original letter of Kingsbury to West, dated December 10, 1914. They are as follows:

[**Letter, December 6, 1914, to Mr. Kingsbury.**]

“530 Riverside Ave.,

Spokane, Washn., Dec. 6th, 1914.

Mr. Kingsbury, Vice-President,

American Telephone & Telegraph Co.,

New York City.

Dear Sir:

In an interview with Mr. McFarland and Mr. Pillsbury yesterday, they advised me they could see no way in which they could carry out the agreement entered into with me last June, as they feared violation of the anti-trust laws. Nor could they suggest any solution but stated they would give the matter some further consideration and advise me within two weeks of the result.

You no doubt recall the circumstances under which the agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement, with your assurances that it would be carried out. I recall you asked to be advised in the event of difficulty being experienced in closing up the matter and I trust you may now be able to suggest a satisfactory solution.

I enclose herewith a copy of the letter of June 20 last by Mr. McFarland upon the subject. Due written notice was given as specified of the desire of the Davenport Co. to sell its property and an appraisalment was made as provided and the value fixed at \$34,623.00, which is set forth in a statement dated October 5th, 1914, signed by H. J. Tinkham on behalf

of the Pacific Co. and myself representing the Davenport Co.

I could and would if desired continue to operate the toll line independent of the exchange by establishing a toll station at Davenport or it could be left connected with the exchange and permit [44] the public to state what connection they wished, but the most rational plan and the natural solution is this. The management of the other exchange in Davenport has for some time wanted and sought connection with my toll lines. I have, as I stated to you in person, up to this time declined to establish the connection although he is in a position to divert considerable business to our lines. I now propose to establish this connection consequently if you purchase our exchange and even though you were to take your toll lines out of the other exchange in Davenport no competition would be destroyed but the conditions of operation would simply be reversed. Your lines could be run into our present exchange which you would purchase and the other exchange would get connection over the independent system. The difference would be that your lines would terminate in your own exchange and you would be in a position to handle your own business and not be subject to the arbitrary actions of your present sublicensee there. There would of course be nothing to prevent your giving him also connection with your lines if you saw fit.

I trust you may look favorably upon this plan, or devise a better one, your people have exhibited considerable ingenuity in the past, and can undoubtedly

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pilot this through a safe course if it is desired to do so.

Yours very truly.

Copy to Mr. Kingsbury."

[Letter, December 10, 1914, N. C. Kingsbury to A. T. West.]

"AMERICAN TELEPHONE AND TELE-
GRAPH COMPANY.

15 Dey Street.

New York, December 10, 1914.

N. C. Kingsbury,
Vice-president.

Mr. A. T. West,
530 Riverside Avenue,
Spokane, Wash.

My dear Sir:

Your favor of the 6th instant is received, together with a copy of a letter to you from Mr. McFarland dated June 20, 1914, and a copy of a letter from you to Mr. McFarland dated December 6, 1914. I remember very well meeting you in Spokane and recall the fact that some negotiations were in progress between you and the officials of the Pacific Company. I was never advised as to the nature of those negotiations, nor did I know any definite agreement had been entered into between your company and the Pacific Company.

I have not heard from Mr. McFarland in regard to the matter, and I feel very certain that any agreement which he made and which can be legally carried out will be.

We are under commitment to the Department of

(Testimony of A. T. West.)

Justice in Washington in regard to the purchasing of independent properties, and we must not break our commitment. In some respects it is probable that we have promised to abide by the wishes of the Department of Justice in matters which might not be, strictly speaking, illegal; but whether a certain transaction would be considered legal or illegal would not influence us so far as the carrying out of our commitment is concerned. That we must do in all cases. [45]

Now, I am not sufficiently acquainted with local conditions to intelligently pass upon the matter in hand, and would much prefer not to do so, as we leave all such matters to our local people. I will, however, communicate with Mr. McFarland with regard to the matter, and I trust something may work out which will be not only entirely all right under the law and under our commitment, but mutually satisfactory.

Yours very truly,

(Signed) N. C. KINGSBURY,

Vice-president.”)

The WITNESS.—(Continuing.) I have refreshed my recollection since adjournment concerning the minutes of our company under which I was authorized to accept this proposition. The record of our minutes shows the meeting as of June 4th in this way. The regular meeting of the board of trustees is scheduled for the first Monday in each month, and many times when it is thought that another meeting would be desired, the meetings are adjourned from time to time. I took care of the cleri-

(Testimony of A. T. West.)

cal work, and the regular meeting of June the 4th, Monday, was adjourned until June 30th, for the reason that Mr. Armin, who is secretary, and one of the directors, was soon to leave. He left Spokane for the east on July 1st, and it was the day before he left that this adjourned meeting was held in which I made a note of the fact that this offer of Mr. McFarland's was reported and acted upon. I was able to refresh my recollection because it was the day before Mr. Armin left for the east. I did not know what time he left, and I have since seen him and he made a note of it in this note-book on the day on which he started for the east. My notes of the meeting were erroneously written up as the meeting of June 4th, and since Mr. McFarland's letter was written June 20th, and without referring to that, I assumed it must be May 20th. As a matter of fact, that was an adjourned meeting that should have been written up that the meeting was adjourned to the 30th, just before he went. It was after this letter was received and talked over, and on a clerical error, I wrote the meeting as the 4th, when it was an adjourned meeting instead. My recollection has been refreshed in this mattter. [46]

Cross-examination by Mr. POST.

We have no secretary's book of the Davenport Company. I was largely instrumental in getting up the Davenport Independent Company. It was organized in 1913. The first meeting was held August 11, 1913. There have been several meetings since then. I did not change these minutes to-day. The

(Testimony of A. T. West.)

secretary's book shows for itself what meetings were held since August 11, 1913. The minutes on June 30, 1914, were written by me. I do not recall whether I did this in 1914 or 1915. I think it was in 1915. I do not remember how long ago. I do not remember whether I wrote the minutes within the last two weeks or not. A person is apt to make mistakes when they do not have a record of things. It was comparatively recent. Within the last few weeks I got up the minutes dated June 4, 1914, from notes made at that time. When the minutes were written, the notes were destroyed. At the time I got up the minutes I was advised when the contract was made, and I fixed the date of the first letter May 20, 1914. Something like ten months elapsed before the minutes were written up and signed by anybody as secretary. Not all of the other minutes were gotten up recently.

Q. As a matter of fact, you did not hold any meeting in June, 1914, at which any trustees were present, but this is an effort to get up some minutes for the purpose of this lawsuit, isn't it? A. No, sir.

Q. Have you got here the minutes of stockholders' meetings at which the board of trustees were elected?

A. Yes, sir.

The WITNESS.—(Continuing.) This was held on January 5, 1914, and at that meeting the people elected as trustees were A. T. West, C. E. West, L. B. Cornell, W. H. Armin, E. P. Arnold. It is not correct that the company was doing a profitable business. It was in debt three thousand dollars. There

(Testimony of A. T. West.)

had been a satisfactory [47] growth of business. Numerous extensions had been made out of the earnings. The company was entirely solvent. There were seven or eight stockholders present June 1st. On June 30th there were five stockholders. We do not have any stock book here. On January 5, 1914, there were only seven or eight stockholders. There were the two Wests, the two Armins and L. B. Cornell; and amount of stock 200.25 present, and absent 49.75. Those were held by W. W. Smith and C. N. Thomas. At the meetings in June, Smith and Thomas had sold their stock to me. The meeting of January, 1915, was not written up. There was a meeting in January, 1915, for the purpose of electing a board of trustees.

Q. In relation to this transaction with the Pacific Company, what business was transacted?

A. Well, there was in this way. To make definitely certain that everything prior to that time was ratified, that is, everything that—everything had been done in connection with this up to this time had been ratified, and—

Q. When are you going to write up those minutes?

A. Whenever we take a notion.

The WITNESS.—(Continuing.) We held a meeting of the board of trustees June 4, 1914, and the minutes are different from those set out in that we adjourned to June 30th. We adjourned from June 4th to June 30th for the reason we knew Mr. Armin was going away, and he was going to be gone for several months, and we adjourned to a period

(Testimony of A. T. West.)

just before he left so that we could handle any business that came up in the meantime. You will notice that the adjourned meeting we adjourned till August, skipping the July meeting because we knew he would not be there. No notice was given to the board of trustees of this meeting held either on June 4th or June 30th. Three trustees were present.

Q. And there was no stockholders' meeting there with reference to this matter? [48]

A. It was referred to in the last stockholders' meeting.

Q. I mean so far as the minutes are concerned.

A. There is something in the minutes of the stockholders' meeting before that, if you will read it.

Q. Find where there is any reference to it, the stockholders' meeting.

A. It doesn't refer specifically to this matter, but we had another matter up covering the same thing.

Q. What date is that? A. January 5, 1914.

Q. I am talking about since you have had some dealings with Mr. McFarland.

The COURT.—Is there anything with relation to this contract in the stockholders' meeting?

The WITNESS.—No, but empowering the president to make such contract.

Mr. POST.—Q. All right, you read any minutes of January 4, 1914, that empower the president to sell all the property of the corporation, or whatever minutes you have referred to; just read it so we will get it.

The WITNESS.—A. Well, "Whereas there ap-

(Testimony of A. T. West.)

pears a possibility of forming a desirable consolidation with other operating telephone companies, or the possibility of making a profitable lease or outright sale of the company's property, resolved that the trustees be and hereby are authorized to enter into such negotiations or to delegate such officer or officers as they see fit with full authority to sell or lease the property of the company." The resolution was adopted by the affirmative vote of all stockholders present.

Mr. TURNER.—When was that?

A. January 5th.

The WITNESS.—(Continuing.) At that meeting 200 shares [49] were present. 350 shares had been issued. The inventory covers the pole line to Cheney; it does not cover the Reardan property. The company did not claim to own anything at Reardan. We claimed to own the exchange at Davenport and some rural lines running to communities that could hardly be called towns; one was Egypt. One pole line ran past Reardan, giving service at Reardan, and running to the city limits of Spokane. At Spokane it connected with the Home telephone line. It was so connected that one could talk from Davenport to Coeur d'Alene, Idaho; that was being done back and forth. The Davenport Company was doing an interstate business with northern Idaho to a limited extent. I did not submit any franchise or any copies of franchises to the county commissioners of either Spokane or Lincoln County to you. You tried to get me to tell what I claimed in the way

(Testimony of A. T. West.)

of franchises out in the country, and I did not do it. I told you we did not sell any franchises. I didn't know whether there were any franchises or not. If I had a franchise in Davenport, it runs to the Local & Long Distance Telephone Company, and you pointed out to me that a certain statute was different from the ordinary foreclosure statute about giving notice of sale under a decree. You pointed out that the statute had not been complied with and that I did not have a franchise in Davenport, in your opinion. You asked me if there was not some officials of the Local & Long Distance Telephone Company who could sign an assignment of that franchise when we were looking up the title. I think I told you that the company was in such a condition that I could not find anybody to sign it. We talked about fixing an assignment of the franchise, or that the city council might pass a resolution recognizing in some way the assignment. You were busy and I said I could draw it up, which I did. You looked it over and said, "I think that will fix it all right." I went down to get it passed and brought back a certified copy. I don't know that you said the resolution would constitute an assignment, but I gathered that [50] inference. You said if anything in the world would fix it up so that I could get an assignment, it would be something like that. You did not tell me it would constitute an assignment that would give a good franchise, but that it was the best that could be done under the circumstances. One of the bills of sale is signed by C. N. Thomas, trustee. He was

(Testimony of A. T. West.)

trustee for me, himself, and Mr. Armin. The pole line to Cheney is about fifteen miles long. No wires have ever been strung on those poles. The poles were erected in 1909, practically to Cheney. It met the other line about five miles west of Spokane. I was trustee in bankruptcy for the Washington Consolidated Telephone Company. Smith never had any association with me. When we bought the property, we gave Smith some stock in the Davenport Independent Telephone Company for it. We gave him stock on the date he gave a bill of sale to us; that was May 27th. The stock was issued on May 27th, 1914. At the meeting of January, 1914, Smith owned more than half of the absent stock. I think he acquired stock before January 1, 1914.

Q. Then he didn't acquire this stock on May 26, 1914?

A. I don't remember—I can't remember those various stock transactions.

Q. Judge Turner says the stockholders' meeting was in 1915, isn't that so?

A. Certainly, that was 1914.

The WITNESS.—(Continuing.) The stock-book will speak for itself as to when we got the stock. I was laboring under a misapprehension that Thomas and Smith owned them at the time, but it is possible they did not. The only thing we do know is who the people were who were present at that meeting. When I was trustee in bankruptcy, I did not sell the property to Smith upon the understanding that Smith would turn it over to my company; he was not

(Testimony of A. T. West.)

a stockholder at the time of the sale; that is clear to me; there may be some discrepancy in dates, or something like that. The stock [51] may have been issued before it was delivered to him. I as trustee in bankruptcy sold to Smith May 12th. Smith lived in Vermont; he was not here then; he was represented by O. B. Setters, the lawyer. We bought from Smith June 1st. I had no communication with Smith during that time.

The WITNESS.—A. Smith came to me long before this got into the Federal Court in bankruptcy and wanted to sell his property, and I looked into the thing a little.

Mr. POST.—What property did he have?

A. He had the old Washington Consolidated property. He was the heaviest stockholder in it. We looked into the situation and said, "You haven't got anything to sell because it is all burned up and balled up," and—you see in the meantime this petition had been filed asking that the company be declared a bankrupt. Smith at that time was trying his best to save it from going bankrupt. He came out here and took assignment of eight or ten thousand dollars worth of these claims; didn't pay them but gave the man his money on the most favorable terms he could get and took an assignment of the claim to himself; he felt he had the whole thing but he didn't have any actual interest; we were operating up there in Davenport immediately adjacent to his property, his lines coming into our property, and he wanted to make some arrangement with us. He consulted with

(Testimony of A. T. West.)

our attorney and found the best thing he could do was to go ahead and have it declared bankrupt and the property sold, and he was going to undertake to buy it in. I was made trustee largely for the reason the properties were adjacent to the property I was operating and I was in a position to look after it without any particular expense and it would not impair the value of the property by disrupting the service that was being given over the lines of the company, and when that was ordered sold, I communicated as trustee with your company and asked if you wanted to put in a bid on it and to the city and town telephone companies asking them [52] to bid on it and both companies answered they didn't care to bid on it; Mr. Smith was in a position to bid more than anybody else did because the big majority of it would come to him anyway. He was considerably the greatest creditor. He bought that in and after that he was perfectly free to do with it as he pleased; he still wanted to sell to us and I was approached several times, and finally I told him I would give them stock for it; Mr. Setters—he communicated with Mr. Smith, I presume, and accepted the proposition. I then gave Smith stock and he transferred the property to the company. I haven't a doubt but what he tried to sell everybody else within the limited time he had.

The WITNESS.—(Continuing.) The line I refer to as operating was the old Local & Long Distance telephone line, which would be the Davenport exchange, and the Spokane toll line and some sub-

(Testimony of A. T. West.)

urban lines. The other property under the bankruptcy sale was a lot of supplies and twenty-two miles of pole line that was being operated in connection with my exchange. I told Smith when he offered to sell before bankruptcy, he didn't have any title to sell it; that the only thing he could do was to get title and then he would be ready to do business. I was trustee in bankruptcy and sold to Smith and he sold back to my company. We gave him \$8,500.00 in stock, par value. He paid \$2,100.00 in bankruptcy for the property. This stock given Smith was not treasury stock. All the stock of the company had been issued prior to that time, and those who had stock paired it off pro rata. O. B. Setters was attorney for me as trustee in bankruptcy. He had been attorney for Smith. In the bankruptcy proceedings is an appraisement and inventory of the property, which describes 12- $\frac{3}{4}$ miles of line under construction. This began at the city limits of Davenport and extended north. It passed through Egypt, a place consisting of two stores and a post-office. There is also an item of ten miles of line semi-standard. This is a branch of the other line about five miles north of [53] Davenport. These lines were not completed to the point they intended to serve.

(The stock-book was then produced, and showed that Mr. Smith's stock was issued on the 27th of May for 20 shares; 1 share to Setters, 43 shares to Smith on May 27th, 133 $\frac{1}{2}$ shares on the 27th to West, and 21 shares to Smith on the 27th, 84 shares to Smith and 1 share to Setters on May 27, 1914.)

(Testimony of A. T. West.)

The WITNESS.—(Continuing.) That was fifteen days after I sold this property as trustee in bankruptcy. If I said that 149 shares of stock belonging to Smith and Thomas were not represented at the meeting on June 1, 1914, that was probably a mistake.

The COURT.—How many shares altogether?

Mr. POST.—350.

The WITNESS.—Well, now, there is West 1 share, L. B. Cornell 1 share, C. N. Thomas 64.75 shares, E. P. Armin 1 share, W. H. Armin 63.75; that was not issued until May.

The COURT.—How can you tell whether they are outstanding or cancelled?

A. At that time Mr. Armin held 85.75 shares.

The COURT.—Mr. Thomas held the same?

A. Mr. Thomas held the same

The WITNESS.—(Continuing.) C. E. West held 1 share, L. B. Cornell 1 share, A. T. West 176½ shares, C. N. Thomas 1 share. I think that was out at that time. 64.75 to Thomas again; E. P. Armin 1 share. That ought to come out 350.

The first letter I got from Mr. Tinkham relative to poles or the taking of any property was dated October 30, 1914. There was a letter that bears date of September 25th, but that did not reach me until after October 30th. When I received it, I remember I noted the difference in time and put a note on the letter at the time. In the meantime I had seen Mr. Tinkham. He said he had sent me a letter and asked if I had got it. I told him no. I [54] told him at that time I did not receive it, and he said he misdi-

(Testimony of A. T. West.)

rected it in care of the other taxicab company, because our office was with the 77 Company.

(The letter of September 25, 1914, was read into the record, and is as follows:

[Letter, September 25, 1914, H. J. Tinkham to A. T. West.]

“Mr. A. T. West, President,
Davenport Independent Telephone Company,
Davenport, Washington.

Dear Sir:

In confirmation of our conversation I am arranging to take from your stock of poles at Davenport fifty 20-foot “E” poles, and will load up the remainder of the car with 25-foot “B” poles. The understanding is these poles will be paid for at the fair market price of poles of this class, f. o. b. Davenport. Please write me advice of your acceptance.

Yours truly,
(Signed) H. J. TINKHAM,
Division Superintendent of Plant.”)

The WITNESS.—(Continuing.) At that time we had a large amount of supplies on hand running to an amount of five or six thousand dollars, consisting of a large number of poles and other stuff that we had no use for unless we continued as originally planned to carry out the construction we had in mind. As originally planned, the people who started the system intended to build a large independent system, When we bought the poles and other stuff, it was in our minds to extend the lines to Miles, Lincoln, Fruitland and Hunters. These are towns in Lincoln County, except Fruitland and Hunters, which are in

(Testimony of A. T. West.)

Stevens County. We also expected to complete the line to Cheney.

Referring to the expression in the letter of September 25th, "in confirmation of our conversation I am arranging to take from your stock," I will say that I had some conversation with Tinkham about his taking some of these poles and using them before the attorney for the Pacific Company had passed upon the title, or before the matter had been definitely settled. I do not know when any of this material was taken or when the first was taken. [55] The next letter I had from Mr. Tinkham was dated October 30th.

(This letter was read into the record and is as follows:

[Letter, October 30, 1914, H. J. Tinkham to A. T. West.]

"Spokane, Wash., October 30, 1914.

Mr. A. T. West: "

On the above-mentioned estimate—"Well, up in the corner there is an estimate 2081—" On the above-mentioned estimate we are going to use the 425 25-foot poles which are now standing along the county road between Sunset Boulevard and Cheney, but in addition to these we will require 17 20-foot poles, class "B," and 236 25-foot poles. Will you kindly advise if you have the character of poles wanted at Davenport, and when you can make shipment of the same to Spokane?

Yours truly,
(Signed) H. J. TINKHAM.")

(Testimony of A. T. West.)

The WITNESS.—(Continuing.) I answered that letter verbally, and soon after I received another letter dated October 31st, which is as follows: “Davenport Independent Telephone Company, Spokane. October 31, 1914. Mr. A. T. West: Concerning our understanding relative to the purchase of poles from stock at Davenport, and also removal and use of poles between the State road and Cheney, will you kindly confirm our understanding if this will be satisfactory to you? The understanding is that in the event that the sale of supplies and plant as agreed upon originally between this company and you is not for some reason carried out that we will pay you for the poles we have taken from stock a fair market price, and we will pay you for the poles between Cheney and the State road a price equal to the reproduction cost new of same, the estimated cost being as agreed upon in the original inventory. Will you kindly acknowledge this understanding? Very truly yours, H. J. Tinkham, Division Superintendent of Plant.” I answered that letter as follows: “Spokane, Washington, November 5, 1914. H. J. Tinkham, Division Superintendent of Plant, Pacific Telephone and Telegraph Company. Referring to your letter of the 31st ult., the arrangement outlined is entirely satisfactory so far as it refers to the poles taken or to be taken from the yard at Davenport, but in reference to the poles between Cheney and the State road, I should like the option of [56] requiring you to replace with new poles of this same class and fitted with the same character of fixtures, etc., such poles as

(Testimony of A. T. West.)

you remove, in the event the general sale of the plant and supplies now pending should not be consummated. With this understanding, there is no objection to your removing the poles as required. Yours truly, Davenport Independent Telephone Company, by A. T. West.”

Redirect Examination by Mr. TURNER.

Referring to our business with northern Idaho, I will say that the business was done in this way: In case a subscriber would want a connection in Coeur d’Alene, we would place a call with the Home Telephone Company in Spokane, and ask them to give us that connection. They would put up the connection through our switchboard and the subscriber would converse. I tried several times to get the Home Telephone Company to recognize the contract between the Washington Consolidated Telephone Company and the Home Telephone Company and the Interstate Telephone Company, Limited. They did not do so. The interstate business I did through them was merely a matter of accommodation from time to time. During a period of over twenty-two months, our total interstate business averaged forty-two cents a month outgoing, and seventy cents incoming, or a total of one hundred twelve cents a month.

The conversation mentioned in the letter by Mr. Tinkham dated September 25th, was a conversation I had with Tinkham when making the inventory, and he said he would like to take some of the poles. He had a place to use them, but at the time I got the letter the poles had been taken and used. As to

(Testimony of A. T. West.)

whether or not the poles had been taken before the letter passed between Tinkham and me, I will say that I do not know the date the poles were taken. At the time I talked to Mr. Post, I did not have an attorney. I had not been advised as to my rights. Mr. Post told me there was no question but what the contract was invalid as against the anti-trust laws of the United States. [57]

Q. Told you there was no doubt it constituted no contract because there was no consideration?

A. Yes, sir.

Mr. POST.—That is objected to as wholly immaterial and not redirect examination.

The COURT.—The questions are rather leading.

Mr. TURNER.—Did he, or not, state to you this did not constitute a contract on the general principles of law?

Mr. POST.—Objected to as being wholly immaterial.

A. He stated that in very emphatic terms.

Q. Intimating to you, you were liable to go to jail?

A. Oh, yes; and other things of that character.

Recross-examination by Mr. POST.

Mr. Post never said that the contract was a lobbying contract or that the consideration was for lobbying, and it was an inequitable and unjust contract, and unenforceable.

Q. You wrote a letter that your counsel has read in evidence here to a gentleman in New York by the name of Kingsbury, in which you stated this was a gentlemen's agreement. What do you mean by that

(Testimony of A. T. West.)

expression in that letter, by a “gentlemen’s agreement,” is that an agreement that is invalid in court in order to enforce some contract in violation of law?

A. When that letter was first given to me—

The COURT.—What do you mean by that expression?

Mr. POST.—When you wrote this letter to Kingsbury, what did you mean by that expression, “gentlemen’s agreement”?

A. That I might have some difficulty in enforcing it in court.

The WITNESS.—(Continuing.) I said that I struggled long and hard to get a contract with the Interstate Telephone Company, Limited, and the Home Telephone Company, for a connecting contract. The Home Telephone Company would give me the use of the exchange; a contract [58] with the Interstate Telephone Company, Limited, would have given me connection with the points they reached. The points they reached were in northern Idaho. I was eager to have a contract with the Interstate Telephone Company, Limited, to do interstate business and to get into Spokane. The Interstate Company also did business in Washington. One place was at Mount Hope, another was Garfield, another was Palouse. We reached them over Interstate lines. The Interstate did not have lines to Garfield; there was another independent company that connected with the Interstate like mine, and it ran to Garfield. The same is true about Palouse.

Q. Were you so eager to get this contract with the

(Testimony of A. T. West.)

Interstate Telephone Company, Limited, in order to do business with Mount Hope, Garfield and Palouse, or was it in order to do business with Coeur d'Alene Wallace and Post Falls and towns in northern Idaho? A. May I state here—

Q. Please answer the question.

A. All the points, of course.

Q. That is, you were anxious to do an interstate business with northern Idaho?

A. I didn't want any connection we had enjoyed in the past disrupted.

Q. You thought that was an important part of your business?

Mr. TURNER.—We will admit that.

Mr. POST.—Well, it is admitted that was an important part of your business, the interstate business with northern Idaho. Do you admit an important part of the business of the Davenport Independent Telephone Company was interstate business with northern Idaho.

Mr. TURNER.—I admit the amount done about twenty-two dollars per year.

The COURT.—It was admitted they were doing some interstate [59] business. I don't think the extent of the business would make any difference with the Sherman Act.

The WITNESS.—(Continuing.) I conferred with Mr. Lane in order to get the Interstate contract. I saw Lane two or three times; the first time was soon after I acquired the property, and I saw him again a few months before it was generally known that there

(Testimony of A. T. West.)

was to be a consolidation here. My connection with Lane was never severed.

Q. Was it continued?

A. With the exception of this extent; with reference to the contract, whether it had been interrupted or not, during the early process of this operation, any business we got from points in Idaho we got the connection through the Home and Interstate for that business and under the old arrangement, any business that was originated in the territory of northern Idaho with the operating company up there in connection with this system was delivered to Davenport and Reardan and the points we reached over our line, and we got a mileage on that; it wasn't much, because that was considered in our statement of revenue as long distance business, but by reason of this consolidation that took place in northern Idaho, that very feature of interstate business was taken away from us, because under the terms of the contract which your company has made with the Interstate which you also owned at one time with any business out of that section of the country, that business comes over the lines of the Pacific Company now; to that extent it had been interrupted.

The COURT.—Is the question the amount of business done or the amount of business tried to be done?

Mr. POST.—The amount of business that might have been done that we might be interfering with if we carried out this agreement.

The WITNESS.—(Continuing.) Prior to January 20, 1914, we were not physically connected with the

(Testimony of A. T. West.)

Interstate, but we got connection through and each month we did some interstate business. We [60] were connected in the usual way. I know of the existence of a contract between the Interstate Telephone Company, Limited, and the Local & Long Distance Telephone Company. I saw it in the files of the telephone company. I also saw one with the Washington Consolidated Telephone Company, which was supposed to supersede the other. That is the one I have reference to. I did not know of the decree of foreclosure mentioned in the contract. I saw the contract with the Washington Consolidated Telephone Company in the office of the Home Telephone Company about two and a half years ago, after I claimed to have purchased the property in question. I went in to see the contract. The vice-president showed it to me. I asked for a copy of the contract, but he did not give it to me. I never saw the contract but once. I think it was just an ordinary connecting contract. It was repudiated so far as I was concerned by Mr. Lane both times I went to see him about it. Barring wire trouble, there never was a time when a customer at Davenport could not talk over my line and through the Home and Interstate Companies to northern Idaho. The same was true the other way, that is, from Idaho to Davenport. The Bell Company had a toll line in northern Idaho in the same territory; it also had an exchange in Spokane, and it extended to the city limits of Davenport and there connected with an exchange operated by Mr. Hanson.

(Testimony of A. T. West.)

Redirect Examination by Mr. TURNER.

On June 20, 1914, at the time the contract in suit was made, the Bell interests owned both the Home and the Interstate.

Recross-examination by Mr. POST.

I know a good deal about that. Before June 20, 1914, the Bell interests owned control in some of the stock, and before June 20, 1914, a decree had been entered at Portland in the Federal Court, requiring them to dispose of their interest. I knew of the decree when the letter dated June 20th was written.

(The decree in the case of United States of America vs. [61] American Telephone Company, Pacific Telephone & Telegraph Company, and others, was marked Defendant's Exhibit #20, and admitted in evidence.)

(At this time plaintiff offered in evidence a resolution of the Board of County Commissioners of Lincoln County, Washington, which is marked exhibit #15, over objection of the defendant that the same is immaterial; that the Board of County Commissioners is a body of limited jurisdiction, and that in order for the Board of County Commissioners to do anything, public notice should be given under the statute.)

[Testimony of W. H. Armin, for Plaintiff.]

W. H. ARMIN was called as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination by Mr. TURNER.

In June, 1914, I was secretary of the Davenport Independent Telephone Company. I think

(Testimony of W. H. Armin.)

that a meeting of the board of trustees was held on June 4, 1914, and a resolution was passed authorizing the president to accept the offer of Mr. McFarland, president of the Pacific Company. This was an adjourned meeting. By that I mean we had a meeting earlier in the month,—a month earlier than June 4th, or something like that. The letter of Mr. McFarland was dated June 20th. I remember the date I went away for the summer. The meeting was held the day before I went away. I went away on July 1st, so the meeting was held on June 30th. That was the adjourned meeting from June 4th. My attention was called to this discrepancy in dates this afternoon.

Cross-examination by Mr. POST.

My business is that of mortgages, loans and real estate in Spokane. I have given some attention to telephone business. I have 63 and a fraction shares of the telephone stock. We had a meeting of the stockholders in January, 1915. I believe we had two other meetings, but they were not formal. I can't remember [62] the date or the month of those meetings. I remember the annual meeting of the stockholders in January. The board of trustees has been together a good many times. The office of the company is at the corner of Riverside and Wall in Spokane. I can't give any specific dates when we had a meeting of the board of trustees. In 1915 the board of trustees consulted on many points of business. I went to the central West in the summer of 1914, and was gone nearly four months. I remember

(Testimony of W. H. Armin.)

that we had a meeting the day before I left, because the fact I was going brought about the meeting. I am secretary of the company. Did not always write up the minutes of the meetings; just made pencil notes; do not recollect writing up the meeting had just before I left. When I didn't write up the minutes of the meetings, Mr. West did so. He was not the secretary; that was my business. I think there have been meetings in 1915 that have not been written up. We had a meeting on June 4, 1914. According to our by-laws, the regular meetings were held on the first Monday of each month. The first Monday in June 14, 1914, was on June 1st. The notes attached to the minutes shown me says: "Meeting Board of Trustees held June 4, 1914." I signed the minutes after I returned from the East. I can't tell the time when I signed them. I can't tell if I signed them within the last week or two. I signed some of them in the last week. I may have signed the minutes of June 4, 1914, within the last week. I can't answer that. It is my best recollection that I signed the minutes within the last week. I don't know where the minutes were written up. I suppose Mr. West did the typewriting.

Q. So it isn't true, is it, that there was any meeting held the 4th day of June?

A. I think it must have been the 1st according to the calendar.

Q. What was done at that meeting? [63]

A. I can't tell you.

Q. You don't remember anything about it.

(Testimony of W. H. Armin.)

A. I can't tell you.

Q. Was there any meeting held between the 4th day of June, 1914, and the 30th day of June, 1914?

A. Not what you would call a regular meeting; that is, I mean no formal meeting.

Q. Then you don't know what was done at the meeting of June 30th, either, do you?

A. I couldn't tell you those things without referring to them. I have too many of them to refer to.

Redirect Examination by Mr. TURNER.

I remember that at that meeting the following resolution was adopted: "Resolved that the offer made by President McFarland on behalf of the Pacific Telephone and Telegraph Company be accepted, and the president is hereby directed to make formal acceptance of the same prior to the expiration of the 60-day limit, also to arrange for the appraisal in accordance with the conditions set forth in the offer."

Recross-examination by Mr. POST.

I don't know whether the action on that resolution was June 1st or June 30th. Mr. West told me of the letter from Mr. McFarland. I don't think I saw it; it was in escrow or somewhere.

Plaintiff rested.

WHEREUPON the following testimony was offered on behalf of the defendant.

[Testimony of H. J. Tinkham, for Defendant.]

H. J. TINKHAM was called and sworn on behalf of the defendant, and testified as follows:

Direct Examination by Mr. POST.

My name is H. J. Tinkham. I am Division Superintendent of Plant with the Pacific Telephone and Telegraph Company for [64] eastern Washington and northern Idaho.

Referring to a map marked exhibit #16, the witness said:

It is a map showing the routes of the toll lines in eastern Washington and northern Idaho belonging to the Pacific Telephone and Telegraph Company, to which has been added the colored lines of the Interstate Telephone Company, Limited, and the Davenport Independent Telephone Company and the Inland Telephone Company. The additions are in lines of red, green and yellow. With those lines off the map is a stock map of the Pacific toll lines. The red lines are the lines of the Interstate Telephone Company, Limited. There are no other companies in eastern Washington connected with the Interstate Telephone Company, Limited, except the Davenport and the Inland, that I know of. The Davenport line as claimed by Mr. West is shown on the map in yellow. There are two exchanges in the town of Davenport; one is run by a man named Hanson; I do not know the name of his company; he has some kind of arrangement with the Pacific Company whereby the toll lines of the Pacific Company are tied up to his exchange; that has been true for a great many years.

(Testimony of H. J. Tinkham.)

Hanson also connects with our line at Reardan. I am the man mentioned in the letters in evidence, which letters are between Mr. West and Tinkham. I did not take any of the property Mr. West claims before having an understanding with him either oral or in writing. The first load of poles was taken from Davenport on September 29, 1914. That lot was one carload, some twenty feet and some twenty-five feet long. The supplies on hand of the Davenport Company in the appraisement amount to about \$4,749.38. The toll line plant figures at \$6,145.00. The toll line at Cheney, \$1,512.75; Davenport exchange plant, \$21,215.42. The amount, \$5,749.38, was greater than the ordinary amount of supplies on hand unless there was some unusual construction anticipated. The carload of poles taken in September with the carload taken November 9th amounted to \$715.00. One carload would amount [65] to one-half of that sum. Before I took the first carload I told Mr. West that I was in need of some poles for our regular construction work, and asked him what position he would take in letting me have the poles. He said I could have them. I told him then that I would not take them unless I could make some arrangement with him whereby I could pay for the poles in the event the contract which I understood he had entered into with the Pacific Company did not go through. He said that was satisfactory, and if the sale was not consummated, I could pay him a fair market value for the poles. I did not take the poles as part performance of the contract. Besides the two carloads of poles,

(Testimony of H. J. Tinkham.)

we took some poles out of the lead that was extended between Sunset Boulevard and Cheney; that was a pole line about twelve miles long. Some of these poles had cross-arms on them, but there were no wires. We took 128 poles out of that lead. We did this because we were setting poles in that immediate vicinity and we needed poles of that height and class; that is, we wanted small poles about twenty-five feet high. My understanding with Mr. West about these poles was that in the event the sale to the company did not go through, I would replace the poles I did take down with poles of equal strength and character. At that time we had no poles of that character in that vicinity. The poles are referred to in the letter dated October 31, 1914. 128 poles would make about four miles of lead. This lead was about five years old. I had a conversation with Mr. West about taking the poles, about as follows: I told him that as far as the agreement he had entered into with the company was concerned, I was not familiar with the terms and conditions, and that I did not know anything about it; however, I was in need of poles and he had a large stock there, and if the company did take over this material later, we would have these poles on our hands, and I thought it would be a good idea to use them at this time; however, I told him, not being familiar with the [66] terms of the contract, that I could not purchase any poles under that contract, and that I would handle the matter as a separate proposition. I had nothing to do with the original contract with West. That was out of my jurisdiction.

(Testimony of H. J. Tinkham.)

(Exhibit #16, being the map above referred to, was admitted in evidence.)

Cross-examination by Mr. TURNER.

The first lot of 29 poles was taken by men under my supervision. I gave them directions to do this between September 25th and the 29th. My conversation with Mr. West antedated that direction by several weeks, or at the time the inventory was made. At that time I had no reason to believe that the contract between the company and West would or would not go through. My reason for writing after the poles were taken was that I wanted it in writing in order that it would be clearly understood what price I would have to pay for the poles in the event I was compelled to pay for them. The letters fixed the fair market value. I wanted to make it clear to Mr. West that I was making a separate deal with him about the purchase of the poles. I wanted Mr. West to confirm that fact, to make it clear to any one who might be interested in it, to my superiors in the company if they wanted to make an investigation of it. Another reason I sought the letters was that I think it is a habit followed by all business men. Whenever we buy poles from anybody, we ask them to submit in writing the price so there will be no misunderstanding afterwards. In this case I had a verbal understanding with Mr. West, and I had written a letter under date of September 25th confirming our understanding. The other letter was dated October 31st. I made numerous attempts to get a written understanding with Mr. West. I did not wait from

(Testimony of H. J. Tinkham.)

September 25th to October 31st. I personally asked Mr. West and had my wire chief call him. I asked him to put our understanding in writing. I told him my [67] understanding was that in the event of the sale not going through, we would pay him the fair market price for the poles we took. We reached that understanding at the time of the inventory and several times afterwards. I wrote the letter of October 31st pursuant to my policy of having everything in writing, and also because we were taking some poles along the road between Sunset Boulevard and Cheney. These poles were taken in the latter part of November, after Mr. West's reply to my letter of October 31st.

Redirect Examination by Mr. POST.

The value of the Cheney poles themselves amounted to about two hundred dollars. The reproduction cost would be about five hundred dollars.

[Testimony of Carrie Lester, for Defendant.]

CARRIE LESTER was called and sworn on behalf of the defendant, and testified as follows:

Direct Examination by Mr. POST.

My name is Carrie Lester. In 1914, I was head bookkeeper for the Interstate Consolidated Telephone Companies, which included the Interstate Telephone Company, Limited, of Spokane. I am now auditor of the Interstate Utilities Company, which is the same property under another name. I am familiar with the contracts made between the Washington Consolidated Telephone Company and

(Testimony of Carrie Lester.)

the Local & Long Distance Telephone Company and the Interstate Company. The contracts are a part of the files in our office.

(The contracts referred to were bound together in one bunch and admitted in evidence as Defendant's Exhibit #17.)

I have investigated the amount of toll business done over the line that runs out of Davenport and Reardan through the Interstate Limited Company to points outside of Washington for the six months before June 20, 1914. There was one message from Davenport to Coeur d'Alene, forty-five cents; one message from Davenport to Sandpoint, fifty-five cents; from Davenport, Washington, to points [68] in Washington outside of Spokane, one message, fifty cents; from Coeur d'Alene, one message thirty-five cents; from points in Washington outside of Spokane to Davenport, from Pullman, one message, thirty-five cents; Oakesdale, one message, thirty cents.

(A statement showing long distance business was admitted in evidence and marked exhibit #19, and consisted of a letter on the letterhead of the Interstate Utilities Company, fastened to the statement showing long distance business from January 1st to June 25th, 1914, inclusive.)

[Testimony of A. G. Avery, for Defendant.]

A. G. AVERY was called and sworn as a witness on behalf of the defendant, and testified as follows:

My name is A. G. Avery. I have practiced law in Spokane for 27 years, and am a member of the firm

(Testimony of A. G. Avery.)

of Post, Avery & Higgins, and have the matter of investigating the title to the property claimed by Mr. West as belonging to the Davenport Independent Telephone Company in charge. I conferred with Mr. West as to what he claimed as his source of title. I asked him to narrate the history, and the memoranda is here. Mr. West dictated to our stenographer a history. He stated a part of it came through foreclosure proceedings instituted by the Washington Trust Company against the Local and Long Distance Telephone Company. The Washington Trust Company purchased at a foreclosure sale and then sold to Thomas, and the chain is substantially the same as the chain heretofore given at this hearing. He did not claim any other sources of title except the mortgage foreclosure proceedings and the bankruptcy proceedings. He claimed nothing through Reynolds. A transfer was made to the Washington Trust Company, then from the Washington Trust Company to Thomas, trustee, then from Thomas, trustee, to the Davenport Independent Telephone Company. On the other side it came from the Washington Consolidated Telephone Company to West, trustee, from West, trustee, to Smith, and from [69] Smith to Davenport Independent Telephone Company. I investigated the bankruptcy proceedings and concluded that the title was not good or satisfactory. The most glaring defect in the bankruptcy proceedings was the fact that they were started by Humbird & Company and two other creditors having claims aggregating some-

(Testimony of A. G. Avery.)

thing around \$3,500.00; that the bankrupt was cited to appear on March 26th of that year, which was 1911, but nothing was done at that time, nor was any continuance taken, but there was on the 10th day of April following an adjudication of bankruptcy. On the 11th day of May the attorneys for Humbird & Company and those other creditors who instituted the proceedings signed a stipulation. This stipulation is found filed on May 13, 1911, and is as follows: "Title of the case, Humbird Lumber Company, R. H. Odgers and J. A. Hurley vs. Washington Consolidated Telephone Company. It is hereby agreed and stipulated between the Humbird Lumber Company, R. H. Odgers and J. A. Hurley, petitioning creditors in the above-entitled matter, and the Washington Consolidated Telephone Company, a corporation, through Freece & Pettijohn, representing such creditors, and H. M. Martin and O. B. Setters, representing said company, that the above-entitled action may be dismissed and an order of dismissal entered herein on this stipulation upon the ground and for the reason that the claims of said petitioning creditors have this day been fully settled and satisfied, including the costs of this proceedings. Dated this 5th day of May, 1913. Signed, James S. Freece and C. A. Pettijohn, attorneys for the petitioning creditors, and H. M. Martin and O. B. Setters, attorneys for the respondents." This stipulation was filed on May 13, 1913. At the time that stipulation was filed, no appearances by other creditors had been filed in the bank-

(Testimony of A. G. Avery.)

ruptcy proceedings. The next step in the proceeding was that at about the time this stipulation was filed, there was an order made by the referee in bankruptcy or by your Honor, directing the debtor to file a schedule, but nothing appeared in [70] respect to that until about the 23d day of October, in that year, when one W. W. Smith filed what purports to be a schedule and named himself as petitioner, and in the schedule this Humbird and the other two claimants appear. About this date, W. W. Smith petitioned the Court to proceed with said proceedings, and the petition states among other things that no order of dismissal was filed, though it does not state that there was an order of dismissal stipulated for. There is nothing in here that shows any reason why that stipulation should not be observed.

On October 23, 1913, the claims of Humbird Lumber Company, R. H. Odgers, and J. A. Hurley were assigned to Smith. These assignments are dated May 5, 1913, and filed October 23, 1913, and the execution of said assignments is by the attorneys of record of the petitioner. I can't find that the bankrupt corporation ever appeared or was served with anything after the stipulation to dismiss. I found an order based on the Smith petition which is apparently an *ex parte* order, as follows: "Comes on regularly for hearing this 23d day of October, the petitioner, W. W. Smith, creditor of the Washington Consolidated Telephone & Telegraph Company, and holder of all the claims mentioned in

(Testimony of A. G. Avery.)

the original petition for bankruptcy, the same having been assigned to him for good and valuable consideration, and asks the Court therein for an order directing that the bankruptcy proceedings herein be proceeded with at once, and it appearing to the Court that the said W. W. Smith has good and sufficient reason and cause therefor, and the Court being fully advised in the premises, now, therefore, it is by the Court hereby ordered that the said proceedings be proceeded with at once." This order is dated October 23, 1913, and signed by Frank H. Rudkin, Judge.

Mr. West, the trustee in bankruptcy, filed an inventory. That inventory, outside of the personal property referred to, refers to some toll lines for twenty-two miles. There is one item of [71] twelve miles of standard construction in Stevens County, including franchises; ten miles of line semi-standard; eight miles of line with some kind of brackets. There is nothing in the bankruptcy proceedings to locate these lines, that is, where they commence and where they end, or what road they are on. There is nothing in the bill of sale given by the trustee in bankruptcy to locate them. In these proceedings, O. B. Setters appeared originally as attorney for the bankrupt, then as attorney for the trustee, then for the creditor, and then for the purchaser. In the entire bankruptcy proceedings there is great confusion as to what the property is. In the foreclosure proceedings against the Local & Long Distance Telephone Company, I don't think

(Testimony of A. G. Avery.)

there is any title at all. In that case one H. H. Reynolds was a party and was dismissed out of the case, but the findings of fact and conclusions of law Nos. 19, 20 and 21 are as follows:

“That after the execution of said trust deed said Local & Long Distance Telephone Company proceeded to continue to carry on its said business and extended its system to some extent and particularly in the construction of a line known as the Soap Lake line and at all times thereafter continued to conduct its business until in January, 1910, when the property of said corporation was taken possession of by said W. N. Purdy, who was at that time appointed as receiver over the company on an *ex parte* application and later, upon a hearing being had, the said receivership was made permanent.

That after the appointment of said W. N. Purdy as receiver of the Local & Long Distance Telephone Company and upon April 8th, 1911, he, as said receiver of said company, petitioned the Superior Court of Lincoln County for an order permitting him to sell all of the property of whatsoever kind and description belonging to said defendant company and that upon said 8th day of April, 1911, said Superior Court of Lincoln County entered an order directing that said sale be made. That in said petition for said sale and in [72] said order directing said sale, no reference whatever was made to the trust deed referred to in plaintiff's complaint herein and upon which the bond issue in this case was based, and said trustee and the plaintiff herein was

(Testimony of A. G. Avery.)

in no way made a party or had any notice whatever of said sale. That upon the first day of May, 1911, said receiver reported to said Superior Court of Lincoln County that he had sold said property and all of the same belonging to said defendant company to one H. H. Reynolds for the sum of \$10,000.00 in cash and at said time said receiver asked the court to confirm said sale, and that thereupon and upon said first day of May, 1911, an order was entered in said cause in said Superior Court of Lincoln County, confirming said sale by the said receiver to H. H. Reynolds.

That the purchaser at said sale took with full knowledge and notice of the trust deed involved in this action, the same having been properly filed, indexed and recorded in Lincoln County and in Spokane County long prior to said sale, and that the price paid for said property, to wit, the sum of \$10,000.00, was far less than the actual value of said property at said time and that in purchasing said property said H. H. Reynolds took the same subject to said trust deed and burdened with the lien thereof.”

The net result of this is that the Court finds the legal title in Reynolds, but inasmuch as he must have taken the mortgage with notice of it, he was bound by the mortgage and did not need to be served with process. Until to-day I never knew of any conveyance made by Reynolds to the Washington Consolidated Telephone Company. Mr. West never informed me of anything of that kind. The fact of a conveyance by Reynolds does not change my opin-

(Testimony of A. G. Avery.)

ion. The sale to Reynolds was made May 1, 1911, and the bill of sale to the Washington Consolidated Telephone Company was dated May 8, 1911. The bill of sale was given before the suit was commenced. In the foreclosure case, the Washington Consolidated Telephone Company, being the grantee in the Reynolds bill of sale, appeared, but not in the [73] cross-complaint. In the cross-complaint it was alleged that it was the owner of the property; that was one of the issues tried out in that case; there was no finding as to the ownership except as I have read. The findings of fact and decree were made May 31, 1912. In the findings of fact and decree there is a statement that about five miles of that toll line do not belong to anybody. In the foreclosure proceedings they purported to sell franchises in Wilbur, Ephrata and Davenport. The proceedings provided for by law were not adopted for the purpose of selling those franchises. Remington & Ballinger's Code, Section 521, requires that franchises should be sold by a certain procedure, the initiation of which is filing a copy of the execution or order of sale in the action in the auditor's office, together with a notice in writing that under such execution or order of sale the officer levying the same has levied upon the franchise to be sold, specifying the time and place of sale, the name of the owner of the franchise, the amount of the claim or judgment for the satisfaction of which the franchise is sold, the name of the plaintiff in the action in which the decree of foreclosure or judgment is entered, and by serving

(Testimony of A. G. Avery.)

a copy of such execution or order of sale and notice upon the judgment debtor or his attorney of record, if any, in the action in which judgment was rendered, twenty days prior to the date of sale. None of that was done. It requires a different notice than that which was given. This is a special statute governing the sale of franchises under execution or order of sale.

Cross-examination by Mr. TURNER.

My objection to the bankruptcy proceedings was I thought that the stipulation of the petitioning creditors and the alleged bankrupt that the proceedings might be dismissed prevented any further action by the Court. At that time there was no trustee. There must have been in contemplation a trustee, although the office may not have been filled. My idea of it was this, that in [74] the first place it was competent to make a stipulation of that kind, and when they declared in the stipulation that the claim was satisfied and discharged, I thought they had a perfect right, or at least I thought it probable, that they had the right to dismiss and so stipulated, and the Court could enter no other order on the subject of stipulation; but in the event that was not true, I felt very sanguine they could not resurrect and resuscitate the case without notifying the one most interested. I do not think there is any jurisdiction, not at least without notice, after the bankrupt has stipulated to dismiss the case. After a case has gone for adjudication, it is for the benefit of the whole world, and they may come in and file

(Testimony of A. G. Avery.)

claims. I think an *ex parte* order for the case to proceed could not be made without a stipulation by or notice to the bankrupt. I thought the bankruptcy case was deficient in the description of the property. I would not like to say I thought the general description of the property would render void an order of the referee in bankruptcy made at a later period, ordering the sale of all the property, but I thought it rather defective. I would not say that it would be void, but it was not at all satisfactory as a description of the title.

As to the point that Mr. Setters appeared for various parties in the case, this and the fact that the proximity of the sale by the trustee to Smith, and resale back to the Davenport Company, with the appearance of one attorney for everybody, would influence me. I considered in this matter the effect of a judicial sale as curing irregularities of this character.

Q. Consider the fact that if there were any objections of that character, they ought to be set up directly in that proceeding, and did not avail to some third person?

Mr. POST.—That is objected to; that hasn't anything to do with it.

The COURT.—Proceed. [75]

A. I did, yes, sir.

Q. You thought that the fact it was a judicial sale and the law requires a direct attack to be made on it and didn't permit a third party to make a collateral attack on it had no effect on the question of title?

(Testimony of A. G. Avery.)

Mr. POST.—I object to that; that is altogether outside of the issues. A person is entitled to a good title and no court of equity will compel a purchaser to take a possible lawsuit where somebody may contest it.

Mr. TURNER.—Did you consider that phase of it?

A. Yes, sir.

Q. What conclusion did you reach with reference to that?

A. That influenced me in giving the decision I did, but I will say that just the angle from which you look at the question, I do not in that particular respect see its application; while I might decide it would require a direct proceeding, that would not necessarily influence me in passing title.

The WITNESS.—(Continuing.) I did not consider that the time for cutting off any right to make a direct attack had expired, nor that an attack had to be made timely and regularly before the court would listen to it. That always holds subject to certain limitations. It occurred to me that the proceedings were nearly, if not absolutely, void.

My first objection to the foreclosure proceedings is that they show Reynolds bought it at a receiver's sale and his purchase was subject to the mortgage, and he was not made a party to the foreclosure proceedings, and therefore he is still the owner of the equity in the property. At the time I passed on the title, I did not know of the bill of sale dated May 11, 1911, but I will not change my mind on it because of

(Testimony of A. G. Avery.)

it. Reynolds was made a party to that suit but was not served. The purchaser at that foreclosure proceeding did not get anything from Reynolds. [76]

Q. I said the purchaser, the Washington Trust Company, received in the foreclosure sale all the right, title and interest of the Washington Consolidated Company.

The COURT.—I do not think an opinion concerning the title has any bearing on the question; that is for the Court to pass on.

The WITNESS.—(Continuing.) My second objection was that the sheriff purported to sell the franchises at Davenport without having levied on them in the manner provided by the statute. I found no other objection except the description of the property was unsatisfactory.

Mr. POST.—I want to put in evidence the pleadings and decree in that Government suit.

(The findings and decree in the case of United States of America vs. American Telephone Company, et al., defendants, were admitted and marked Defendant's Exhibit #20.

The answer of The Pacific Telephone and Telegraph Company and others in the same case was admitted in evidence and marked Defendant's Exhibit #21.

The original petition in the same case was admitted in evidence and marked Defendant's Exhibit #22.

An application for modification of decree in the same case was admitted in evidence and marked De-

(Testimony of A. G. Avery.)

Defendant's Exhibit #23.

An order modifying the decree in the same case was admitted in evidence and marked Defendant's Exhibit #24.) [77]

On March 11, 1913, a petition was filed in the District Court of the United States for the Eastern District of Washington, Northern Division, by Humbird Lumber Company, a corporation, R. H. Odgers and J. A. Hurley, stating that they are creditors of the Washington Consolidated Telephone & Telegraph Company, having provable claims aggregating in excess of the security held by them in the sum of five hundred dollars (\$500.00); the claim of the Humbird Lumber Company being three thousand five hundred eighty and 30/100 dollars (\$3,580.30), the claim of R. H. Odgers being sixty-five and 80/100 dollars (\$65.80), the claim of J. A. Hurley being twelve and 65/100 dollars (\$12.65). The petitioners represented that the Washington Consolidated Telephone & Telegraph Company being insolvent within four months theretofore, had committed an act in bankruptcy in that a receiver was appointed in the Superior Court of the State of Washington in and for Spokane County, and they asked that the Washington Consolidated Telephone & Telegraph Company be adjudged a bankrupt. On March 11, 1913 a subpoena was issued to the Washington Consolidated Telephone & Telegraph Company requiring it to be and appear at the District Court held in Spokane in the said district on the 26th day of March, 1913, then and there to answer

the petition. On April 10, 1913, the Washington Consolidated Telephone & Telegraph Company was adjudged a bankrupt. On April 10, 1913, reference of the said cause was made to the referee in bankruptcy. On April 29, 1913, an order requiring the bankrupt to file schedules in the proceeding was made. On May 13, 1913, a stipulation signed by James S. Freece and C. A. Pettijohn, attorneys for petitioning creditors Humbird Lumber Company, R. H. Odgers and J. A. Hurley and by H. N. Martin and O. B. Setters, attorneys for the Washington Consolidated Telephone & Telegraph Company, to the effect that the said cause may be dismissed and an order of dismissal entered upon the said stipulation upon the grounds and for the reason that the claims [78] of said petitioning creditors "have this day been fully settled and satisfied, including costs of this proceeding." This stipulation was dated May 5, 1913; filed in the court on May 13, 1913. On October 23, 1913, W. W. Smith filed in the said cause assignments of the claims of Humbird Lumber Company, R. H. Odgers and J. A. Hurley and attached thereto a petition stating that he purchased from the said creditors named in the petition in bankruptcy their claims against the Washington Consolidated Telephone & Telegraph Company and that he was now the lawful holder and owner and asked the court for an order directing that proceedings be proceeded with at once according to law. This petition was filed on October 23, 1913, and on October 23, 1913, Frank H. Rudkin, Judge of the

United States District Court for the Eastern District of Washington, made an order in said cause directing the proceedings to continue at once. On October 25, 1913, schedules showing a list of creditors of the Washington Consolidated Telephone & Telegraph Company, together with the amounts of their several claims, together with a recital that the said claims had been assigned to W. W. Smith, were filed in the said cause. The schedules were signed by W. W. Smith. The first meeting of creditors was noticed for November 7, 1913. On November 7, 1913, the first meeting of creditors was held and A. T. West was named as trustee and his bond was fixed at two thousand dollars (\$2,000.00). A bond was furnished and approved by the referee on November 8, 1913. An inventory was filed March 10, 1914, setting forth tools and equipment, office furniture, materials of various kinds appraised at two thousand one hundred fifty-five and 20/100 dollars (\$2,155.20), poles distributed on line and in Stevens County and including franchises, six hundred dollars (\$600.00), 12 $\frac{3}{4}$ miles standard construction, \$3,250.00; 10 miles line semi-standard, \$2,000.00; 8 miles line, some brackets, \$500.00; all of said property and lines, including contracts and franchises, being appraised in the total sum of eight thousand five hundred [79] five and 20/100 dollars (\$8,505.20). On April 23, 1914, a petition to sell the property of the bankrupt submitting bids that had been received and reciting that \$2,100.00 had been bid by W. W. Smith, which was the highest bid that the trustee thought he could get, was filed. On

April 24, 1914, a notice to creditors was mailed calling a meeting of the creditors for May 5, 1914. At the meeting of the creditors held on May 5, 1914, the referee ordered the property sold and authorized the trustee to sell to W. W. Smith for \$2,100.00 all of the assets of the bankruptcy estate and directed that conveyance of said property be made. On May 13, 1914, an account of the trustee in bankruptcy was filed. Another meeting of the creditors was called for May 26, 1914, for the purpose of declaring a dividend and transacting such other business as might properly come before the meeting. On May 27, 1914, at the meeting of the creditors, a dividend of three per cent was declared and the trustee was ordered to pay certain expenses and taxes. On September 11, 1914, the trustee in bankruptcy filed a full and complete report of all funds received and disbursed by him. A meeting of the creditors was called for October 13, 1914, for the purpose of passing on final account and report of the trustee in bankruptcy and to declare a final dividend. On October 14, 1914, the final account and report of A. T. West, trustee in bankruptcy, was approved and attorney's fee of three hundred fifty dollars (\$350.00) was allowed to O. B. Setters, attorney for the bankrupt for the proceedings, and a final order of distribution was made after directing certain expenses to be paid. On November 23, 1914, a final discharge of the trustee was made. In these proceedings O. B. Setters was attorney for W. W. Smith, A. T. West the trustee in bankruptcy, and the Washington Consolidated Telephone & Tele-

graph Company the bankrupt. This was according to the endorsements made on the various papers filed by these parties in the cause. [80]

IT IS HEREBY STIPULATED by the parties to the above-entitled cause, through their respective attorneys, that the above and foregoing is an accurate condensation of the evidence taken in the above named case, and, together with the original exhibits, constitutes all of the evidence taken in the said case, and the same may be approved by the Court or the Judge thereof directing that the original exhibits admitted in evidence in the said cause, except such as are set forth in full in the said statement, and except the files in the proceedings in bankruptcy of Washington Consolidated Telephone and Telegraph Company, an abstract of which is contained in the statement, shall be attached to and made a part of said statement; also, that the said condensation, together with the original exhibits and pleadings in the case, orders, opinion and decree, and the several papers evidencing steps taken to perfect an appeal, shall constitute the record on appeal in the said case.

Dated at Spokane, Washington, this 17th day of November, A. D. 1915.

(Signed) TURNER & GERAGHTY,
 Attorneys for Plaintiff.
 POST, AVERY & HIGGINS,
 Attorneys for Defendant. [81]

**[Order Approving Statement of Evidence and
Directing That Certain Original Exhibits be
Attached Thereto.]**

United States of America,
Eastern District of Washington,
Northern Division,—ss.

The foregoing statement, in a simple and condensed form, of the evidence taken in the above-entitled cause, being a true and complete statement of said evidence, and properly prepared, is hereby approved; and it is hereby ordered that the original exhibits referred to therein, except such as are set forth in full in said evidence, and except the files in the proceedings in bankruptcy mentioned in the foregoing stipulation, shall be attached to the said statement as a part thereof, to be considered as a part of the record on appeal in said cause.

Dated at Spokane, Washington, this 17th day of November, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge of the District Court of the United States for
the Eastern District of Washington.

[Endorsements]: Statement of Facts. Filed in the U. S. District Court for the Eastern District of Washington. November 18, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [82]

*In the District Court of the United States for
the Eastern District of Washington, Northern
Division.*

No. 2109

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COM-
PANY,

Defendant.

Petition for Appeal.

To the Honorable FRANK H. RUDKIN, Judge of
the District Court of the United States for the
Eastern District of Washington:

The above-named defendant, Pacific Telephone
and Telegraph Company, conceiving itself to be
aggrieved by the decree made and entered in this
cause on the 4th day of September, A. D. 1915, does
hereby appeal from said decree to the United States
Circuit Court of Appeals for the Ninth Circuit. It
prays that this, its appeal, be allowed and that a
transcript of the record, proceedings and papers
upon which said final decree, order and judgment
were made, duly authenticated, be sent to the United
States Circuit Court of Appeals for the Ninth
Circuit.

And now at the time of the filing of this petition
for appeal, the defendant files an assignment of
errors setting forth separately and particularly

each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner, Pacific Telephone and Telegraph Company, further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.
[83]

(Signed) THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

By POST, AVERY & HIGGINS,
Solicitors for the Defendant.

[Endorsements]: Petition for Appeal. Filed in the U. S. District Court for the Eastern District of Washington. September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [84]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2109

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled cause and says that in the decree herein made and entered on the 4th day of September, 1915, there is manifest error, and files the following assignment of errors committed and happening in the said cause, upon which it will rely upon its appeal from said decree:

1. The Court erred in holding that said paper writings set forth in the complaint, which the Court designates a contract, were authorized by the stockholders of the plaintiff, and in holding that the same became a contract without such authorization although the same purport to sell and dispose of the entire property of the corporation plaintiff.

2. The Court erred in holding that this cause was of equitable cognizance and that plaintiff does not have a full, complete and adequate remedy at law.

3. The Court erred in holding that the plaintiff's title to the property in question is a marketable title and in no manner a defective title.

4. The Court erred in holding that the provision in the alleged contract that the title to the property must be acceptable to the attorneys for the defendant is unenforceable, and that the defendant must take and pay for such property even though such title is not acceptable to such attorneys and even though the opinion of such attorneys adverse to the title is neither fraudulent nor [85] capricious.

5. The Court erred in holding that said alleged contract is not in violation of an act of Congress en-

titled. "An Act to protect trade and commerce against unlawful restraints and monopolies," which said law was passed July 2, 1890, and is commonly known as the Sherman Anti-Trust Act, and in holding that said contract is enforceable in equity notwithstanding such act of Congress.

6. The Court erred in holding that said alleged contract is not in violation of a decree entered against this defendant and others in the United States District Court for the State of Oregon in a suit brought by the United States of America as complainant in July, 1913, which decree is referred to in the answer in this cause, and in holding that said contract is enforceable in equity notwithstanding such decree.

7. The Court erred in holding that the said alleged contract is not void and unenforceable under the statute of frauds.

8. The Court erred in holding that the alleged contract is not so indefinite and uncertain in its terms and provisions as to be unenforceable in equity.

9. The Court erred in holding that the plaintiff is entitled to a decree of specific performance as prayed for in the complaint.

10. The Court erred in holding that the plaintiff is entitled to recover from the defendant the sum of \$34,623.00 and interest.

(Signed) THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY,

Defendant.

By POST, AVERY & HIGGINS,
Solicitors for the Defendant.

[Endorsements]: Assignment of Error. Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [86]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Order Allowing Appeal.

On this 29th day of September, A. D. 1915, on motion of Post, Avery & Higgins, solicitors and counsel for the Pacific Telephone and Telegraph Company, for an order allowing an appeal and fixing the amount of the bond on appeal and for supersedeas, and the petition for said appeal and for an order fixing the amount of bond, together with an assignment of errors, having been filed in court heretofore, it is

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein on September 4, 1915, be and the same is hereby allowed, and that a certified transcript of the record,

testimony exhibits, stipulations and all other proceedings herein be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Thirty-five Thousand Dollars (\$35,000.00), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Done in open court this 29th day of September, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Allowing Appeal. Filed in the U. S. District Court for the Eastern District of Washington. September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [87]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Appeal and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That the Pacific Telephone and Telegraph Company,

a corporation organized and existing under and by virtue of the laws of the State of California, and doing business in the State of Washington, as principal, and the National Surety Company, a corporation authorized to do business as surety in the State of Washington, as surety, are held and firmly bound unto the Davenport Independent Telephone Company, a corporation, in the sum of thirty-five thousand dollars (\$35,000), to be paid to the Davenport Independent Telephone Company, a corporation, for the payment of which, well and truly to be made, we bind ourselves jointly and severally and each of our successors and assigns firmly by these presents.

SEALED with our seals and dated this 29th day of September, A. D. 1915.

WHEREAS, lately, at a session of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between the Davenport Independent Telephone Company, as plaintiff, and the Pacific Telephone and Telegraph Company, as defendant, a decree was rendered against the said The Pacific Telephone and Telegraph Company in the sum of Thirty-four Thousand Six Hundred Twenty-three Dollars (\$34,623.00), and the said The Pacific Telephone and Telegraph [88] Company, a corporation, having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in the aforesaid suit, and a Citation directed to the said Davenport Independent Telephone Company is

about to be issued, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

NOW, THEREFORE, the condition of this obligation is such that if the said The Pacific Telephone and Telegraph Company, a corporation, shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY,

Principal.

By POST, AVERY & HIGGINS,

Its Solicitors.

NATIONAL SURETY COMPANY,

[Seal]

By JAMES A. BROWN,

Resident Vice-president.

By S. A. MITCHELL,

Resident Assistant Secretary. [89]

State of Washington,

County of Spokane,—ss.

On this 29th day of September, A. D. 1915, before me personally appeared S. A. Mitchell, the resident assistant secretary of the National Surety Company, a corporation, with whom I am personally acquainted, who, being by me first duly sworn, stated that he is the resident assistant secretary of the National Surety Company; a corporation; that he knows the corporate seal of said company; that it

was affixed to the foregoing instrument by order of the board of directors of said company, and that he signed said instrument as resident assistant secretary of the said corporation, by the authority of the said board of directors, and that said S. A. Mitchell acknowledged the instrument to be the free and voluntary act and deed of said corporation; that the said National Surety Company, a corporation, is doing business as a surety company in the State of Washington and is authorized to execute this bond, and that it is worth more than double the amount of the bond in property in the State of Washington not exempt from execution.

[Seal] (Signed) FRANK V. DUBOIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

The foregoing bond is approved both as to form and sufficiency of surety, both as an appeal and supersedeas bond, this 29th day of September, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Appeal and Supersedeas Bond.
Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [90]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Citation.

The President of the United States to the Davenport
Independent Telephone Company, a corpora-
tion, and to Turner & Geraghty, Its Solicitors,
Greeting:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be held
at the City of San Francisco, in the State of Califor-
nia, within thirty days from the date hereof, pursu-
ant to an order allowing an appeal filed in the office
of the clerk of the District Court of the United States
for the Eastern District of Washington, Northern
Division, wherein the Davenport Independent Tele-
phone Company, a corporation, is plaintiff and ap-
pellee, and the Pacific Telephone and Telegraph
Company, a corporation, is defendant and appellant,
to show cause, if any there be, why the decree ren-
dered against the said defendant and appellant
should not be corrected and why speedy justice

should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 29th day of September, A. D. 1915, and of the Independence of the United States the one hundred and fortieth.

(Signed) FRANK H. RUDKIN,
United States District Judge.

[Seal] (Signed) W. H. HARE,
Clerk. [91]

[Endorsements]: Citation. Due and personal service of the above Citation made and admitted, and receipt of a copy thereof acknowledged, this 30th day of September, A. D. 1915. (Signed) Turner & Geraghty, Solicitors for the Davenport Independent Telephone Company. Filed in the U. S. District Court for the Eastern District of Washington. September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [92]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Order Enlarging Time for Filing Record on Appeal.

This Court having on the 29th day of September, 1915, made an order allowing an appeal from the final decree entered in the above-entitled cause and court on September 4th, 1915, to the United States Circuit Court of Appeals for the Ninth Circuit, and having this day signed a Citation directed to the Davenport Independent Telephone Company, the plaintiff above named, and to Turner & Geraghty, its solicitors, citing them or admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, California, within thirty days from September 29th, 1915, and it also appearing to the Court that a condensed statement of the evidence has not been prepared, filed or approved by this Court as required by Section B of Rule No. 75 of Rules of Practice for Courts of Equity of the United States, and it appearing that a praecipe for the record on appeal cannot at this time be filed because the statement of the evidence has not been approved by the Judge of this court, as required by Rule 75 above mentioned, and the Judge of this court and the Judge who signed the Citation will leave the City of Spokane, Washington, this 29th day of September, to go to the City of San Francisco, California, to sit on the Circuit Court of Appeals, and will not return to the City of Spokane, Washington, or to this jurisdiction until on or about November —, 1915, and it appearing that no opportunity will be [93]

had for the defendant and appellant or its solicitors to lodge and have approved by this Court the statement of the evidence, as required by said Section B of said equity rule of practice No. 75, before the said Judge leaves this jurisdiction nor after his return thereto, nor will the plaintiff and appellee have opportunity to make objections or proposed amendments, within the time so that the transcript of the record may be filed with the Appellate Court on the return day named in the Citation, and it appearing that Rule 16 of Rules of the United States Circuit Court of Appeals for the Ninth Circuit provides that the Judge who signed the Citation, on good cause shown, may enlarge the time for lodging the transcript of the record before its expiration and it appearing that good cause is shown for the enlargement of the time for lodging the said transcript of the record;

It is therefore ORDERED that the time for return named in the Citation issued herein and for filing the record and docketing this cause with the Clerk of the United States Circuit Court of Appeals be and the same is hereby enlarged and fixed at thirty (30) days from the 15th day of November, 1915.

It is further ORDERED that the time for approving and settling the statement of the case in said cause be and the same is hereby extended to the 15th day of November, 1915, and that the time for filing a praecipe for the record on appeal shall be extended until November 15th, 1915.

vs. Davenport Independent Telephone Co. 121

Done in open court this 29th day of September, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Enlarging Time for Filing Record on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [94]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Praeipce [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit the following records, proceedings and papers in the above-entitled cause:

Complaint.

Answer.

Opinion.

Decree.

Abstract and condensation of testimony.

Original exhibits introduced upon the trial except such as are excepted by stipulation herein after mentioned.

Stipulation of the parties relative to the abstract and condensed form of the evidence, and that the original exhibits may be sent up on appeal and considered a part of the record.

Order enlarging the time for preparing and filing the condensed form of evidence.

Order of the Court directing that the original exhibits be sent up on appeal and considered a part of the record on appeal, and

All papers and proceedings on appeal.

Dated at Spokane, Washington, this 19th day of November, A. D. 1915.

(Signed) POST, AVERY & HIGGINS,
Attorneys for Defendant, Pacific Telephone and
Telegraph Company.

[Endorsements]: Service of the within praecipe by receipt of a true copy thereof admitted this 19th day of November, A. D. 1915. (Signed) Turner & Geraghty, Attorneys for Plaintiff. Praecipe. Filed in the U. S. District Court for the Eastern District of Washington. November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [95]

**[Certificate of Clerk U. S. District Court to
Transcript of Record and Exhibits.]**

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action as the same remain of record and on file in the office of the clerk of said District Court, as called for by defendant and appellant in its praecipe; and that the same constitute my return to the order of appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, lodged and filed in my office on the 29th day of September, 1915.

I further certify that I hereto attach and herewith transmit the original Citation issued in said cause.

I further certify that I hereto attach and herewith transmit original exhibits on file in said action, as follows:

Plaintiff's Exhibit # 2—Inventory.

3—Ordinance No. 147 and Resolution.

4.—Bill of Sale by Reynolds.

5—Summons and Complaint.

6—Sheriff's Return of Sale.

7—Findings of Fact and Conclusions of Law.

8—Bill of Sale by Brockman as Sheriff.

9—Bill of Sale by Washington Trust Company.

10—Bill of Sale by Thomas.

[96]

11—Franchise.

12.—Bill of Sale, Trustee to Smith.

13—Bill of Sale by Smith.

14—Letter, McFarland to West.

15—Resolution, Board of County Commissioners.

Defendant's Exhibit 16—Map.

17—Contracts.

19—Statement Long Distance Business.

20—Decree.

21—Answer.

22—Petition.

23—Application for 'Modifica-
tion of Decree.

24—Order Modifying Decree.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amounts to the sum of forty-one dollars and fifteen cents (\$41.15), and that the same has been paid in full by Post, *Russell & Higgins*, attorneys for the defendant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said district, this 29th day of November, 1915.

[Seal]

W. H. HARE,
Clerk. [97]

[Endorsed]: No. 2693. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Telephone and Telegraph Company, a Corporation, Appellant, vs. Davenport Independent Telephone Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 2, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

DAVENPORT INDEPENDENT TELEPHONE
COMPANY,

Plaintiff and Appellee,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant and Appellant.

**Stipulation [That Original Exhibits may be
Considered Without Printing Copies in Record].**

IT IS HEREBY STIPULATED AND AGREED by the parties to the above-entitled cause, through their respective attorneys, Turner & Geraghty for the plaintiff and appellee, and Post, Avery & Higgins for the defendant and appellant, that they have heretofore stipulated that the original exhibits admitted in evidence in the trial of said cause in the United States District Court for the Eastern District of Washington, Northern Division, might be attached to the record on appeal and considered as a part of the record; and the Judge of the said District Court has made an order directing that the said original exhibits be sent to this court as a part of the record on appeal herein, and that the same may be considered on the appeal without printing copies of the said exhibits in the record on appeal.

vs. Davenport Independent Telephone Co. 127

DATED at Spokane, Washington, November 18th,
1915.

TURNER & GERAGHTY,
Attorneys for Plaintiff & Appellee.

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Court of Appeals for the Ninth Circuit. Davenport
Independent Telephone Company, Plff. & Appellee,
vs. The Pacific Telephone and Telegraph Company,
Deft. and Appellant. Stipulation. Filed Dec. 2,
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IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a Cor-
poration,

Appellant,

VS.

DAVENPORT INDEPENDENT
TELEPHONE COMPANY,

Appellee.

2693

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

Filed

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F. D. Monckton

Brief of Appellant

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STATEMENT OF THE CASE.

This is an action for specific performance brought by vendor, the appellee, under an alleged contract to sell a telephone exchange and certain toll lines to appellant. A decree was entered as prayed for and an appeal taken therefrom.

The complaint alleges the corporate capacity of appellant and appellee and that appellee was the owner, and operating a telephone exchange in Davenport, Washington, with suburban lines therefrom and toll lines reaching several towns and communities, also a toll line extending to the city of Spokane, Spokane County, and as well a considerable quantity of telephone poles and other material in stock. That its poles were set generally in public highways and that "plaintiff owned and held and possessed public or private easements for the maintenance of all its telephone lines as hereinbefore described." (Trans. pp. 2-3). That on June 20, 1914, the appellant gave plaintiff a letter in two paragraphs; the first paragraph of the letter providing that "in the event of the consolidation of the two exchanges now in Spokane" the appellant agrees to make a contract with the appellee, giving the appellee "a connection with the consolidated exchange and through that exchange with the system of the Interstate Company under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane." To understand the significance of this paragraph a brief explanation of the situation is necessary. There were two exchanges in the city of Spokane, one the Pacific (a Bell Company) and the other the Home. A company called "Interstate" had a telephone system in Northern Idaho with a toll line to Spokane connected with the Home exchange. The Pacific Company also had a telephone system extending from Spokane and covering northern

Idaho. One of the Bell companies had acquired control of the Home and the Interstate and the United States Government had brought a suit in equity against the various Bell companies in the Northwest and against various independent companies, alleging violation of the Sherman Anti-Trust Act in that the Bell companies had purchased various independent companies, or the control thereof, thus stifling competition. A short time before June 20, 1914, a decree had been entered in this suit which, among other things, required the Bell Company to sell its interest in the Interstate Company and also to sell its interest in the Home Company, but as to the latter the decree provided that if the city authorities of Spokane should desire a consolidation of the two exchanges in Spokane that the Pacific Company might file a petition requesting a modification of the decree so as to permit the same and in that event the Interstate Company should have connection with the consolidated exchange. Appellee had at this time connection with the Home Company and through that exchange connection with the Interstate Company and was doing an interstate business. At the time this letter was written the city council of Spokane had before it the question of the consolidation of the two exchanges but had not reached a conclusion as to whether they did or did not desire such consolidation. Reading paragraph 1 of this letter (Trans. p. 4), it will be seen that the Pacific Company agreed that in case of consolidation of the two exchanges that the appellee would have connection with the consolidated exchange and through

that exchange with the system of the Interstate Company. This concession was clearly of great value to the appellee because the Home exchange was very small, while the Pacific exchange was very large. A short time after the date of this letter the city council of Spokane resolved in favor of the consolidated exchange and a petition therefor was accordingly filed in the government suit and the decree accordingly modified. The appellant has never questioned the right of the appellee to be connected, as set forth in this paragraph, and expressly so concedes in the answer.

The second paragraph of the letter provides that if the appellee should desire to sell its property to the appellant and so notifies the appellant in writing within sixty days, an appraisement shall be made of the reproduction value of the property by Mr. West (to whom the letter is addressed) and by an engineer selected by the appellant, and if they fail to agree a third party is to be brought in and "the Pacific Company will thereupon pay the amount so fixed and the Davenport Company will thereupon convey to the Pacific Company *that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.*" (Italics ours).

On August 10th a letter was written by Mr. West to the appellant stating that the appellee desired to sell the property in accordance with the terms of the letter of June 20th.

The complaint further alleges that Mr. West and an engineer of the appellant thereafter appraised the property at the sum of Thirty-four Thousand Six Hundred Twenty-three Dollars (\$34,623.00). The complaint also alleges that the appellee is the owner of this property and can make good and indefeasible title thereto and has offered "to make title to it by good and sufficient conveyance of all the property belonging to said system *or of such part thereof as defendant may declare it is lawfully entitled to acquire*, and has demanded of it that it receive such conveyance and pay the plaintiff the purchase price as fixed by said appraisers, but the said defendant refused and ever since has refused to accept a conveyance of said property or to pay to the plaintiff the purchase price thereof."

It is alleged in paragraph 6 of the complaint (Trans. p. 7) that the defendant undertakes to excuse itself for refusal to pay by saying that it is precluded by the anti-trust laws of the United States from acquiring any part of said property and that its contract is contrary to said laws and therefore not binding, but that appellee alleges the fact to be that none of the telephone lines belonging to it come in competition with any telephone lines belonging to the appellant "except the toll lines before described, extending from Davenport, Washington, to Spokane, Washington, and that the right to acquire such line was discussed between plaintiff and defendant prior to its offer of June 20, 1914, and that the status of the said line and the want of ability of the defendant

to lawfully acquire it, if indeed there be such inability, was as well known to it then as it is now."

Paragraph 7 of the complaint contains certain allegations relative to the value of appellee's property but no evidence was introduced on this subject and no attention need be paid thereto.

Paragraph 8 alleges that the appellee is ready, willing and able to make title to all or any part of its properties and now tenders "whenever the said defendant shall elect the part of the properties of said system it is willing to receive or in default of such election, *on the judgment of this court determining that the defendant may lawfully acquire from plaintiff any part or all* of the property of its said system." to deposit in the registry of this court for appellant, in accordance with said judgment, good and sufficient bills of sale and deeds.

The only other material allegation of the complaint is an allegation that the appellant has actually partly performed, by receiving 525 telephone poles. As these were received under a contract that this act should not be treated as part performance of the disputed contract and the poles should be paid for without regard thereto, and the learned trial judge so found, no further attention need be paid thereto.

The answer admits the corporate capacity of the parties. Denies that the appellee had any franchise to operate a telephone exchange in Davenport or was the owner of such exchange or any part thereof, and denies that the appellee was the owner

of the other telephone property referred to in the complaint. Admits that the appellee was in possession of a telephone line from Davenport to Spokane, and denies that it had any grants of easements or franchises in public highways. Admits the writing of the letter of June 20th and the receipt of the letter from Mr. West set out in the complaint. Admits that before the title to the property had been examined by its attorneys or the validity of said writings had been considered or passed upon it requested one of its employees to act with Mr. West in making an appraisal of the property and that these two persons made such appraisal and signed the appraisal set out in the complaint. Denies that there was any part performance of said alleged contract, and alleges a written agreement between the parties whereby the poles referred to were taken by the appellant. (The court below found with the appellant on this issue.) Admits that Mr. West has demanded payment and offered to execute a deed and that the defendant has refused to accept same. Admits that it has stated to said West that it is precluded by the Sherman Anti-Trust Act from acquiring said property, but denies that that is the only reason for appellant's failure to make payment. Denies the other remaining allegations of the complaint and affirmatively alleges:

(a) That the paper writing of June 20th is not a contract and that there was never any valuable or lawful consideration therefor.

(b) That the attorneys for appellant have examined the title to the properties referred to and that such title is not acceptable to said attorneys and they have so advised appellant.

(c) That the plaintiff has not, as a matter of fact, merchantable title to said properties.

(d) That the appellee has not even a franchise or permit to operate an exchange in the city of Davenport.

(e) That on June 20, 1914, and for many years theretofore and ever since, the appellant has been engaged in interstate commerce in telephonic communication between the states of Idaho and Washington and has controlled and operated telephone lines between nearly all of the cities and towns in the state of Idaho in the northern part thereof and nearly all of the cities and towns in the state of Washington, whereby the people residing or being in one state may have and do communicate telephonically through the lines operated by the appellant with the people residing or being in the other state. That on June 20th and before and since toll lines which the appellee claims to own extending from Davenport and Reardan and other communities to Spokane were connected telephonically with the lines of a system which was being operated in competition with appellant's telephone lines between eastern Washington and northern Idaho, which system belonged to the Interstate Telephone Company and the Home Company of Spokane, and there was a contract be-

tween the appellee and the other companies providing for such connection and by virtue thereof appellee was engaged in interstate commerce, transmitting telephone messages between various points in the state of Washington and various points in the state of Idaho, whereby those resident or being in one state could or did talk over the said lines with those resident or being in the other state.

(f) That in July, 1913, the United States Government brought an action in the United States District Court for Oregon against this appellant and other companies for the purpose, among other things, of preventing appellant from acquiring the property of the Interstate Company referred to, and the property of the Home Company referred to, upon the ground that such acquisition would violate the terms of the Sherman Anti-Trust Act, and in said action prior to June 20, 1914, a decree was entered perpetually enjoining appellant from acquiring said properties, with the qualification that if the local authorities of the city of Spokane should decide in favor of the consolidation of the two exchanges in that city, to-wit, the Home exchange and appellant's exchange, then said decree might be modified to permit such consolidation, but with the proviso that the Interstate Company should be connected with and have the benefit of such consolidated exchange and said competition in interstate telephonic communication should be continued, all of which was well known to the appellee on June 20th, 1914. That appellant, at said time, desired to have said two exchanges thus consolidated

and expected to obtain municipal consent thereto and in order to protect the appellee in its connection in Spokane and thereby with the system of the Interstate Company and to protect its interstate business, the appellant agreed with Mr. West as set forth in paragraph one of said letter of June 20th.

(g) That the telephone line or system described in the complaint was on June 20, 1914, and ever since has been, of no value to the appellant because merely a duplication of the plant owned and operated by the appellant.

(h) That the sale of the property referred to to the appellant by the appellee would be in violation of the Sherman Anti-Trust act and that the same would be in 'restraint of trade or commerce in telephonic communication between the two states mentioned and would tend to monopolize such commerce.

(i) That said sale would also be in violation of the decree in the suit brought by the United States Government, which decree was known to the appellee on June 20th, 1914.

(j) That at the time of signing said paper writing the real situation was not appreciated by the appellant and as soon as the matter was submitted to its counsel it was advised by them that said contract was in violation of said act of Congress and said decree and void and unenforceable for other reasons, and immediately thereafter appellant so notified said West.

(k) That said paper writings are also void and unenforceable under the Statute of Frauds of the State of Washington.

(1) That the appellee has a full, complete and adequate remedy at law and this court is without jurisdiction in equity.

The evidence is brief and practically without conflict, as stated in the opinion of the trial judge. It established that Mr. A. G. Avery of the firm of Post, Avery & Higgins, for many years attorneys for appellant, made a careful examination of the title and found and reported the same unsatisfactory and unmerchantable. It is not contended that he was not thoroughly competent to pass upon the question, nor is it contended that his action was arbitrary or capricious. The trial judge decided that inasmuch as no name was specifically set out in the letter of June 20th in the clause, "the title to such property to be acceptable to the attorneys for this company," that that clause was unenforceable.

The evidence established that Mr. West knew what attorneys would examine the title and told Mr. Avery that he claimed title through two judicial proceedings; as to the major part of the property through a mortgage foreclosure, and as to the remainder, but a material part, through a bankruptcy proceeding. The findings of fact in the mortgage foreclosure, constituting a material part of the judgment roll under the Washington statute, set forth that one H. H. Reynolds had legal title to the

property. He was named as a party defendant and did not appear and was not served with process. The court in that proceeding held that it was unnecessary to bring him into court because he acquired the property with knowledge of the trust deed or mortgage which was being foreclosed. The trial judge admitted that no title was acquired under the mortgage foreclosure proceeding, saying, "Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in this way." (Trans. p. 36). Appellee introduced in evidence a bill of sale from Mr. Reynolds to Washington Consolidated Telephone & Telegraph Company, dated May 8, 1911, one of the defendants in the mortgage foreclosure action, which bill of sale antedated the findings of fact and decree in the foreclosure case, the latter being dated May 31, 1912. This bill of sale was not shown to Mr. Avery, nor did Mr. West claim that the same constituted a muniment of title until the day of the trial. (Trans. pp. 91, 100). The trial judge held that this bill of sale cured that defect in the foreclosure proceedings. This will be discussed later. The record of the bankruptcy proceedings showed that the same was started by a petition on March 26, 1913, and that on May 11th of the same year the attorney for all of the creditors who had appeared therein signed a stipulation that said proceedings should be dismissed for the reason that the claims had been fully paid and satisfied. This stipulation was never set aside. Subsequently a document was filed purporting to be an assignment of the claims of these same creditors

to one W. W. Smith, the assignment being signed by the attorneys for the creditors, and Smith filed a petition stating that he was assignee, asking for an order directing that the bankruptcy proceedings "be proceeded with," and in October, 1913, such an order was made. The same Mr. West was appointed trustee in bankruptcy. The description of the property in the inventory is indefinite, stating that there are toll lines for about twenty-two miles, but there is no statement whereby the toll lines could be located. The same attorney appeared for the bankrupt, for the trustee, for the creditors and for the purchaser. This W. W. Smith became the purchaser and joined Mr. West in the present appellee. He gave a bill of sale of the property, with an indefinite description, to the appellee and became a stockholder therein. (Trans. 102-3).

The evidence showed and it was conceded that the appellee and appellant were both engaged in interstate commerce in competition with each other and that while that business was not large it was admitted (Trans. pp. 77-8) that the appellee desired to do an interstate business and considered it an important part of its business, and we quote a part of the testimony relating thereto on cross-examination of Mr. West.

"Q. Were you so eager to get this contract with the Interstate Telephone Company, Limited, in order to do business with Mount Hope, Garfield and Palouse (which are towns in Washington), or was it in order to do business with Coeur d'Alene, Wallace and Post Falls and towns in

northern Idaho? (Coeur d'Alene, Wallace and Post Falls are in Idaho).

A. May I state here—

Q. Please answer the question.

A. All the points of course.

Q. That is you were anxious to do an interstate business with northern Idaho?

A. I did not want any connection we had enjoyed in the past disrupted.

Q. You thought that was an important part of your business?

MR. TURNER: We will admit that.

MR. POST: Well, it is admitted that was an important part of your business, the interstate business with northern Idaho. Do you admit an important part of the business of the Davenport Independent Telephone Company was interstate business with northern Idaho?

MR. TURNER: I admit the amount done about twenty-two dollars per year.

THE COURT: It was admitted they were doing some interstate business. I do not think the extent of the business would make any difference with the Sherman Act."

The pleadings and decree in the suit brought by the United States Government referred to were admitted in evidence and show that the purchase of this property by the appellant would be contrary to the spirit, and, we think, the letter thereof, and the will of the Government.

That such was the understanding of the parties at the time these letters constituting the so-called contract were written and that for that reason and other reasons there was no binding contract enforce-

able in equity between the parties is shown by a letter introduced in evidence by the appellee written by Mr. West to Mr. Kingsbury, vice president of the American Telephone & Telegraph Company, in which Mr. West stated (Trans. p. 57): "You no doubt recall the circumstances under which the agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement with your assurances that it would be carried out." The nature of the business at hand was the obtaining from the city council its consent to a consolidated exchange. Mr. Kingsbury promptly replied (Trans. p. 59), stating that he was unaware that any agreement had been entered into and "We are under commitment to the Department of Justice at Washington in regard to the purchasing of independent properties and we must not break our commitment. In some respects it is probable that we have promised to abide by the decision of the Department of Justice in matters which might not be, strictly speaking, illegal; but whether a certain transaction would be considered legal or illegal would not influence us so far as the carrying out of our commitment is concerned. That we must do in all cases."

Other material facts will be best referred to in the argumentative part of this brief.

SPECIFICATIONS OF ERROR.

1. The court erred in holding that the plaintiff is entitled to a decree of specific performance. A decree should have been entered dismissing this action.

2. The alleged contract was not authorized by the stockholders nor at any regular or called meeting of the directors. The court erred in holding that there was any binding contract.

3. The alleged contract is indefinite and uncertain in its terms and the court erred in refusing to hold that for that reason specific performance should not be decreed.

4. The opinion of appellant's attorneys adverse to the title is conclusive, and the court erred in holding that it could ignore the provision of the alleged contract that the title to the property must be "acceptable to the attorneys" of the appellant and in holding that provision to be nugatory.

5. The title is in fact unmerchantable and the court erred in holding to the contrary.

6. The court erred in holding that the purchase of this property would not violate the Sherman Anti-Trust Act and in holding that a court of equity would compel such acquisition notwithstanding the Sherman Anti-Trust Act.

7. The court erred in holding that the purchase of this property would not violate the decree of injunction granted against this appellant and others on

behalf of the United States before the so-called contract was made (of which decree the appellee had notice), and in holding that a court of equity would compel such acquisition notwithstanding said injunctive decree.

8. The court erred in holding that the opinion of appellant's attorneys that the appellant could not "lawfully acquire" this property was not conclusive and in holding that the court could compel the acquisition of this property notwithstanding such opinion.

9. The court erred in holding that a court of equity would enforce this alleged contract by decree of specific performance notwithstanding the written statement of the appellee that the "circumstances" surrounding the making of same and "the nature of the business at hand" were such as to constitute the same unenforcible and notwithstanding the evidence relating to such circumstances and business showed that the same related to matters pending before the legislative body of a municipality and to interstate commerce.

10. The remedy at law is adequate and the trial court so held, but erred in holding that notwithstanding that fact a court of equity should take jurisdiction and enter a decree.

ARGUMENT.

Contract uncertain in its terms.

The so called contract is so indefinite and uncertain in its terms as to deny specific performance. The language of paragraph 2 of the letter (Trans., p. 4), omitting the parts immaterial to the point, is:

“In the event that the Davenport Company desires to sell its property to the Pacific Company and so notifies the Pacific Company in writing within sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company * * * and the Davenport Company will thereupon convey to the Pacific company *that portion of its property which the Pacific Company may lawfully acquire*, the title to such property to be acceptable to the attorneys for this company.”

Does that mean that the appellant agrees to pay the appellee the reproduction value of *all* of the property of the appellee although the appellant may not “lawfully acquire” but one-half or one-third or one-tenth or none of said property? Such is the interpretation put thereon by the complaint.

Paragraph VIII of the complaint (Trans., p. 8) states that the appellee will convey all or any part of the property “Whenever the said defendant shall elect the part of the properties of said system it is willing to receive.” And that paragraph further states: “or in default of such election, *on the judgment of this court determining that the defendant may lawfully acquire from plaintiff any part of or all of the properties of said system.*” But the prayer of the complaint is not

that the appellee shall recover the value of the property which the appellant may lawfully acquire, but the appraised value of *all* of the property, to-wit, \$34,623.00. If the contract means that the appellant shall pay the appellee the reproduction value of all of the property, although it may not lawfully acquire any of it or only a part of it, then the contract is unconscionable and inequitable and clearly unenforcible under the rule laid down by the Supreme Court in *Willard v. Tayloe*, 8 Wallace, 557, and *Wesley v. Eells*, 177 U. S., 370.

The contract may possibly mean that the appellant shall take title to that which it may "lawfully acquire" and pay the reproduction value of that part only, leaving the remainder with the appellee. It may be that the parties had in mind that the appellant might lawfully acquire some part of the property notwithstanding the Sherman Anti-Trust Act and the government decree but that it could not acquire some other part of the property because of said act and decree.

Whatever it in fact means, it is clear that the contract contains no description of the property to be conveyed and either that such description is to be obtained from the appellant's attorneys or it is to be ascertained by a judgment of the court. If it means that such description is to be obtained from appellant's attorneys, then no decree can be granted herein because the attorneys have concluded that the appellant may not *lawfully* acquire any of this property (more fully argued below). If it means that this question shall be determined by the court (which is not stated in the con-

tract) or if this most important question of fact is left open for future determination, either by the parties themselves or in any other manner, the contract is incomplete as to an important provision.

The one certainty in relation thereto is that the contract is vague and uncertain and that the terms thereof are not so precise as that neither party could reasonably misunderstand them. Under such circumstances a court of equity will not decree specific performance.

The case of *Colson v. Thompson*, 2 Wheaton 336, lays down the rule as follows:

“The contract which is sought to be specifically executed ought not only to be proved but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it but will leave the party to his legal remedy.”

The Supreme Court cited the above quotation with approval in *Dalzell v. Dueber Manufacturing Co.*, 149 U. S., at page 326, adding thereto a quotation from other authorities to the effect that a court of chancery will not decree specific performance “unless the proof is clear and satisfactory both as to the existence of the agreement and as to its terms.”

In *Walcott v. Watson*, 53 Fed. 429, 435, Judge Hawley stated the rule as follows:

“Whether a contract be such as is provable by parol, or is required by the statute of frauds to be in writing it must be certain and unequivocal in

all its essential terms, either within itself or by reference to some other agreement or matter, or it cannot be specifically enforced."

In *Minnesota Tribune Co. v. Associated Press*, 83 Fed. 350, 357, the principle is thus stated:

"A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which the complainant seeks to enforce is vague or uncertain a court of equity will not interfere but will leave him to his legal remedy."

In *Kane v. Luckman*, 131 Fed. 609, 612, the court states the principle as follows:

"Specific performance will not be decreed unless it is clearly shown that the contract is completed, and that its terms are fair, and so definite and certain that they cannot be reasonably misunderstood."

In *Hildreth v. Duff*, 143 Fed. 139, the contract was somewhat informal, like that in the case at bar. The court, commenting thereon, says:

"Looking at the whole paper, it seems to me that Thibodeau had a right to understand that the contract related to Hilderth's business as then conducted, and that the machines mentioned in the body of the paper were not other than such as had already been made the subject of recitation. At any rate, the interpretation which the complainant seeks to have put on the general terms in the body of this paper is by no means so clearly its import as to meet the requirement laid down, as we have seen, by the United States Supreme Court. Nor can it, I think, be successfully maintained that the terms of this paper are so precise as that neither party could reasonably misunder-

stand them. The foregoing views lead to a decree adverse to the complainant."

FINALITY OF ATTORNEY'S OPINION AS TO TITLE.

The so-called contract set out in the complaint (Trans. p. 5) contains the following provision:

"The Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, *the title to such property to be acceptable to the attorneys for this company.*"

It is conceded that Mr. West, the president of the appellee, came to Post, Avery & Higgins, attorneys for the appellant in Spokane, and gave them a written statement as to the sources of title and also certain original bills of sale. (Trans. p. 91). Mr. Avery, acting for the firm in the examination of the title, concluded that the same was unmarketable and unacceptable, and so reported. It is not contended that he was not competent or that he acted fraudulently, arbitrarily or capriciously. That this firm were and had been for a long time the attorneys for the appellant, is not questioned. The only reason given by the trial judge for refusal to enforce this stipulation is stated by him as follows (Trans. p. 37):

"The memorandum contains a provision that the title should be acceptable to the attorneys for the defendant. No attorneys were mentioned, and under such circumstances I do not think that the attorneys should be held to be final arbitrators

whose decision can only be impeached for fraud or mere capriciousness.”

That the fact that “no attorneys were mentioned” renders the stipulation of no force or effect, is, we believe, without support in principle or authority.

It is manifest that the reason for such a stipulation and its enforcement is stronger in a case of this kind than in that of an ordinary real estate transaction. Here the property was largely personal. The vendor asserted that he obtained a part thereof through bankruptcy proceedings and a part thereof through mortgage foreclosure. Questions would naturally arise as to municipal franchises, easements on public highways and across private property, validity of judicial proceedings, rights of creditors and power of the appellee to sell its entire property, and perhaps other questions. The letter of June 20th shows that the appellant was not seeking to purchase this property. It is merely an option given to the vendor provided certain conditions were fulfilled, to-wit:

- (a) Notice in writing was to be given by the vendor within sixty days.
- (b) That the vendee may lawfully acquire this property.
- (c) That its attorneys should approve of the title.
- (d) That an appraisement should be had, and, we think,
- (e) That the attorneys should decide what if any property it may lawfully acquire.

It is evident that the appellant was seeking to avoid harassment and litigation and that this letter was

worded with that end in view. The principle is stated in 39 Cyc. pages 1509 and 1510, as follows:

“It is perfectly competent for the parties to stipulate that the title of the vendor shall be such as will be pronounced good and merchantable by an attorney, title or trust company, or other third person, and the purchaser will not be required to take a title not so pronounced good so long as there is good faith, although the court may deem it good under the law. Under such a contract the approval or disapproval by such third person is conclusive if made in good faith and with no improper motive, although in the opinion of the court the title may be good as a matter of law.”

In *Allen v. Pockwitz*, 103 Cal. 85; 36 Pac. 1039; 42 Am. St. Rep. 99, the stipulation in the contract was

“Title to be examined and accepted or rejected by J. DeWitt Allen’s attorney.”

(No name mentioned.) The court said:

“It was but a reasonable and prudent precaution on the part of the plaintiff to insist upon the condition that the title should be passed and accepted by his own attorney, contrary to whose opinion and advice he was unwilling to invest \$35,000 in a city lot. * * * But in the case at bar, according to our construction of the contract, the only warranty of representation as to the quality of the title was that it should be acceptable to plaintiff’s attorney. Therefore, the question whether or not the title was in fact a good marketable title is not involved as it was in the case cited by counsel for respondents; and since it appears that plaintiff’s attorney rejected the title and it is not even suggested that the rejection was not the result of a sufficient examination and an honest opinion, the order granting a new trial should be reversed.”

In *Watts v. Holland*, 11 S. E. p. 1015 (Va.), the same question arose. No attorneys were mentioned. The court said:

“The contract bound the plaintiff and his associates to take the lands only in the event the titles on examination proved satisfactory; and if in good faith they were not satisfied with the titles after their counsel had examined and reported upon them, they were justified in abandoning the contract.”

In *Farm Land Mortgage Co. v. Wilde*, 136 Pac. 1078, no attorney was mentioned in the contract, nor did the word “title” appear, the provision being “said abstract to be passed upon by a resident lawyer of Oklahoma employed by second party.” An attorney was employed by the purchaser and he gave an opinion that the title was defective, and the court held the same to be final.

A similar stipulation was upheld in *Atwood v. Fagen*, 134 S. W. 765 (Texas). (No attorney was named.) The same court, in *Grier v. International Stock Yards Co.*, 96 S. W. p. 79, enforced a similar stipulation, containing, however, the names of the attorneys for the purchaser.

In *Smith v. Lander*, 106 S. W. 703 (Texas), the court again enforced a similar stipulation where the examining attorney is not named.

In *Whitener-London Realty Co. v. Ritter*, 126 S. W. 856 (Ark.), the following stipulation was enforced:

“It is further agreed that the conveyance of said timber and the abstract of title to the land upon which it stands is to be approved by some

attorney selected by the party of the second part on or before the payment of the money and the execution of the notes herein provided for."

In *Ives v. Crawford County Bank*, 124 S. W. 23 (Mo.), in addition to the written agreement for the sale of land, there was an oral agreement that one A. H. Harrison was to examine the abstract of title. The court said:

"And it may be further stated that where a contract provides that the title of the vendor shall be such as shall be approved by an attorney, then the approval and judgment of such attorney, in the absence of fraud or collusion, is binding on the parties, even though the attorney's opinion is wrong."

In *Flannagan v. Fox*, 26 N. Y. Sup. p. 48, affirmed by the Court of Appeals in 39 N. E. 857, without opinion, the contract provided for the approval of the title by a certain trust company. The court said:

"In *Hudson v. Buck*, 23 Moak Eng. R. 808, 811, the court construed a contract to purchase 'subject to the approval of the title by the purchaser's solicitor' to comprehend something more than an obligation on the part of the vendor to tender merely a title free from valid legal objection. Indeed, the court intimated that the vendee's exaction of the condition that the title should be approved by his solicitor was regarded by it as an intentional precaution on his part against the possibility of being subjected to the vexation and expense of litigating disputed questions affecting the title by reason of his having entered into the contract of purchase; and such, it seems to us, was the purport of the covenant in the case at bar."

The distinction suggested by the learned trial judge

is manifestly untenable and without support in reason or authority. The attorneys for the appellant having in good faith disapproved the title, a court of equity cannot set aside the stipulation and compel the purchaser to do that which it never agreed to do.

Counsel for appellee will be forced to rely upon authorities where the contract provides that the title or performance shall be to the satisfaction of the *purchaser* instead of to the satisfaction of the attorney or some other third party. In such cases there is a division of authority, some cases holding that the purchaser is bound to be satisfied if the title is a marketable title; other cases holding that it is immaterial that the title is in fact good if the purchaser in good faith is not satisfied therewith. All of the authorities, however, hold that there is a plain legal distinction between these cases and those where the contract provides that the title shall be satisfactory to an attorney or some other third party. This is clearly pointed out by the text and the authorities in 39 Cyc. pp. 1509-10.

Title in Fact Defective. The rule is, as stated by Judge Andrews for the Court of Appeals in *Fleming v. Burnham*, 100 N. Y. 1 at p. 10:

“A title open to a reasonable doubt is not a marketable title.”

We are confident that the appellee does not have a marketable title. The learned trial judge conceded in his opinion that the muniments of title furnished by the appellee to the attorneys for the appellant did not show a marketable title but he held that a certain bill of sale

given by one Reynolds presented for the first time upon the trial made out a marketable title and that the defendants were bound to perform.

Mr. West called upon Mr. Avery and informed him as to the appellee's source of title, dictating to a stenographer a history thereof, stating that a part of it came through foreclosure proceedings instituted by the Washington Trust Company against the Local & Long Distance Telephone Company, the Trust Company purchasing at the sale and then conveying to Thomas, who conveyed to the appellee, and that the remainder of the property came through bankruptcy proceedings, Mr. West being trustee in bankruptcy, and conveyed to Smith and Smith conveyed to the appellee. (Trans. p. 91.)

Only a comparatively small part of the property came through bankruptcy proceedings, as testified to by Mr. West (Trans. pp. 52, 70). The Davenport exchange and the majority of the toll lines came through foreclosure proceedings. (Trans. pp. 68-70.)

That no title was obtained under the foreclosure proceedings, as shown by the judgment roll itself, is conceded by the trial judge and is not open to question. The findings of fact (Exhibit No. 7) establish that the mortgage was given by the Local & Long Distance Telephone Company (Finding No. 7); that the defendant H. H. Reynolds was not served with process and did not appear (Finding No. 11); that defendant Purdy was receiver of the Local & Long Distance Telephone Company and under order of court

sold all of its property on April 8, 1911, to H. H. Reynolds, and that said sale was confirmed (Finding No. 20); that said Reynolds purchased with knowledge of the mortgage and subject thereto (Finding No. 21); that the reason for making the Washington Consolidated Telephone & Telegraph Company a party defendant was because it owned a quantity of the bonds secured by the mortgage (Finding No. 16). The decree of foreclosure is based upon these findings. Inasmuch as there was neither service nor appearance on the part of the owner of the property, H. H. Reynolds, the decree of foreclosure was void and no title to the property was acquired by the purchaser at the sale, the Washington Trust Company, or by any vendee of it. This the trial judge conceded, saying (Trans. p. 36): "Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in that way." It is therefore clear that at the time Mr. Avery turned down the title his conclusion was right according to the evidence presented to him. The appellee had furnished him with its history of the title and its muniments of title, as it was bound to do. No suggestion had been made that it claimed title from any other source. Upon trial, however, it contended that it claimed title through a bill of sale given by Mr. Reynolds dated May 8, 1911, to Washington Consolidated Telephone & Telegraph Company. (Exhibit No. 4.) There is no bill of sale or deed from the latter company to anyone, but they claim that at the time of the entry of the foreclosure decree that company, in fact, owned the property and therefore the foreclosure

decree was valid and the sale thereunder was valid and title was obtained by the appellee through that sale. In other words, *they are seeking to prove that the findings of the court in the foreclosure case are false and because of their falsity the decree is valid*, and that is the reasoning of the trial judge. (Trans. p. 36.)

We confidently assert: (a) That the mere fact that Reynolds gave a bill of sale in May, 1911, does not establish that he was not the owner of this property *one year thereafter*, May, 1912, the date of the decree. (b) That a court of general jurisdiction having jurisdiction over the property and *having adjudicated that Reynolds was the owner of said property in May, 1912*, that such adjudication is *final* as to the parties to that suit and all claiming under them. (c) The plaintiff in that suit was the purchaser at the sale and conveyed to Thomas, who later conveyed to appellee, and appellee claims that it acquired the interests of the parties to that suit under that decree and that the mortgage on this property was thereby wiped out. (d) That in any event this court cannot in this proceeding, upon this record, adjudicate that the *findings* of the other court are *false* and on that theory compel specific performance by this appellant.

It is elementary that the burden is upon the appellee to establish that it has a marketable title and that "A title open to a reasonable doubt is not a marketable title."

It was not contended in the court below but may be contended here that the appellee got title to this pro-

perty through the bankruptcy proceedings, the bankrupt being the Washington Consolidated Telephone & Telegraph Company. A sufficient answer to such a contention is that this property was never listed, inventoried, or sold in the bankruptcy proceeding and the appellee has never contended that it obtained title thereto in that manner. If it did acquire that property in that way it got it subject to a mortgage which is still in existence because never foreclosed. We again call attention to the fact that the appellee never prior to the trial of this cause claimed anything through Reynolds or said bill of sale. (Trans. pp. 91, 96, 100.)

Mr. Avery also objected to title under the foreclosure proceeding because there was no sale of the franchises in the manner provided by statute. The court below brushed that aside with the statement that if the sheriff's return is fair upon its face he can make no objections and a judicial sale cannot be collaterally attacked. (Trans. p. 37.) We are not making any attack. We are entitled to have presented to us a title that is not subject to attack in any manner. The sheriff's return, which is an exhibit herein, is not fair upon its face and shows that the statute in relation to the sale of franchises was not complied with, the same being Sections 520 and 521, Remington & Ballinger's Codes, explained by Mr. Avery. (Trans. pp. 97-8.) The text of said statute is as follows:

§520. "All franchises of every kind and nature heretofore or hereafter granted, shall be subject to sale upon execution, and upon order of sale issued upon foreclosure of mortgage, in the same

manner as any other personal property may be sold upon execution or upon order of sale under foreclosure of mortgage, except as hereinafter provided."

§521. "The levy of such execution or order of sale shall be made by filing in the office of the auditor of the county in which the franchise was granted, a copy of the same, together with a notice in writing that under such execution or order of sale, the officer levying the same has levied upon the franchise to be sold, specifying the time and place of sale, the name of the owner of the franchise, the amount of the claim or judgment for the satisfaction of which the franchise is to be sold, and the name of the plaintiff in the action in which the decree of foreclosure or judgment is entered; and by serving a copy of such execution or order of sale and notice, upon the judgment debtor, or his attorney of record, if any, in the action in which judgment was rendered, twenty days prior to date of sale. Notice may be served upon a defendant in the same manner that summons is served in civil actions. The sale of any franchise under execution or order of sale upon foreclosure must be made at the front door of the court house in the county in which the franchise was granted, not less than twenty days after the levy of the execution, or order of sale and the giving of the notice as in this act provided."

That such statutes must be strictly complied with has been held by universal authority. See 17 Cyc. 947. The question was directly passed upon in *Lawrence v. Times Printing Co.*, 22 Wash. 482 at p. 490.

A material part of the property is the exchange in the city of Davenport. That exchange would be valueless without a franchise. The appellant was certainly not purchasing mere junk. The appellee did not ac-

quire title to the franchise under the foreclosure proceeding. That point could be raised either by the municipality or the grantee of the franchise. The appellant is not estopped from raising this point by the fact that Mr. Post in good faith had a conversation with Mr. West in relation to this matter before the title had been finally passed upon by Mr. Avery, suggesting to Mr. West that he get an assignment of this franchise from the Local & Long Distance Telephone Company, and when informed by Mr. West that that was impossible conversed with him about getting some resolution from the City Council recognizing the assignment and that Mr. West got such a resolution. Mr. West testified (Trans. p. 66): "You did not tell me it would constitute an assignment that would give a good franchise but that it was the best that could be done under the circumstances."

That a court of equity will not force a title like this upon a purchaser is settled by authority and it of course makes no difference whether the title comes through a judicial sale or in some other manner.

In *Holmes v. Wood*, 32 Atl. 54 (Pa.), it was claimed that an undivided one-eighth interest in the property in question was acquired by the vendor through a partition sale. The court held it was not marketable, laying down the following rule:

"A decree for specific performance is of grace, not of right. It will never be made in favor of a vendor unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee where he is able to show circumstances which would make it unconscionable to do so."

In *Martin v. Hamlin*, 57 S. E. 381 (Mass.), the vendor's interest came through a mortgage foreclosure. The opinion states:

"Both parties concede that a mere possibility or suspicion of a defect in title will not prevent the ordering of specific performance, and that it will not be enforced when there is a fairly reasonable doubt as to the title."

The court then discusses the mortgage foreclosure proceedings and concludes its opinion by saying:

"It is enough to hold that the validity of such a sale is so doubtful that no one should be compelled to take a title depending upon it for validity."

In *Jeffreys v. Jeffreys*, 117 Mass. 184, in determining the question of title, it was necessary to construe a will and the court held that, while they might be of the opinion that the title was good and might so decide in an action for damages, they would not decree specific performance, saying:

"In an action of contract to recover damages for breach of the agreement the court would necessarily decide all such questions for the purposes of the suit and as between the parties to it because they affect the rights and obligations of the parties under the agreement, all of which are concluded between them by the judgment. But the consequences of such decision do not extend beyond that judgment. On the other hand, the effect of this proceeding in equity, if the plaintiff should prevail, would be to require the defendant to accept as perfect a title which he may hereafter be compelled to defend against encumbrances now pointed out, the validity and effect of which cannot now be conclusively determined as against future litigants who may seek to enforce them. *

* * hence the propriety and the necessity of the rule in equity that the defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful."

This case is cited with approval in *Wesley v. Eells*, 177 U. S. 370, 376.

In *Butts v. Andrews*, 136 Mass. 221, we find this:

"The plaintiff's title depends on the construction to be given to the peculiar phraseology of the will; and even if we were inclined to the opinion that he took an estate in fee still the title is not so clear that the defendant ought to be specifically compelled to accept it and thus to assume the risk of subsequent litigation with persons not now before the court."

In *Fisher v. Eggert*, 64 Atl. 957 (N. J.), that court lays down the following rule:

"This court has uniformly refused to decree specific performance by a purchaser in all cases where the title of vendor cannot with certainty be pronounced free from doubts."

In *Herman v. Somers*, 38 Am. St. Rep. 851 (Pa.), the rule is stated as follows:

"In equity a marketable title is one in which there is no doubt involved, either as a matter of law or fact."

In *Townsend v. Goodfellow*, 12 Am. St. Rep. 736 (Minn.), it is said:

"The purchaser is entitled to a marketable title, one clearly shown to be good. It must therefore be free from reasonable doubt. If it rests entirely upon record evidence, and the muniments of title are preserved accessible it will be a question for

the court to determine upon their inspection, a question of legal construction. If it is to be established by proof of matters of fact not of record, the case must be made very clear by the vendor to warrant the court in ordering specific performance."

The last sentence above quoted is pertinent in relation to the contention of appellee that the judgment roll in the decree of foreclosure is false in finding that Reynolds was the owner of the property.

The fact that in the foreclosure proceeding there was an allowance of Fifteen Hundred Dollars for attorney's fees for the plaintiff and that the property was bid in at the sum of Fifteen Hundred Dollars and the bondholders received nothing whatever would also challenge the attention of the careful lawyer because it is an invitation for an attack by the bondholders. We will now refer to the remarkable record in the *bankruptcy proceeding*. Three of the creditors of Washington Consolidated Telephone Company, having claims of about Thirty-five Hundred Dollars, filed a petition in bankruptcy on March 11, 1913. (Trans. p. 102.) In April an order was made adjudging the respondent bankrupt and requiring the filing of a schedule. In May a stipulation of the petitioners was filed stating that *their claims had been fully settled and satisfied* and that an order of dismissal might be entered. In October one W. W. Smith filed an alleged assignment to him of the claims of these petitioners signed only by the attorney for the petitioner, which assignment is dated May 5, 1913, the date of the stipulation that these same claims had been paid. (Trans.

p. 93.) At the time said stipulation was filed no other creditors had appeared. In November this same Mr. West was appointed trustee in bankruptcy. An inventory was filed in March, 1914, which inventory referred to some telephone lines but did not describe them, stating neither any terminus nor on what road or roads located. (Trans. p. 94.) In May there was entered an order authorizing the sale of the property to W. W. Smith for Twenty-one Hundred Dollars. On June 1, 1914, said Smith gave a bill of sale executed in Vermont of this same property to the appellee corporation, of which West, trustee in bankruptcy, was president, receiving therefor stock in this corporation. (Exhibit 13; Trans. pp. 52, 70.) West testified that in the transaction Smith was not here but was represented by O. B. Setters, his attorney. (Trans. p. 68.) Setters was also attorney for West as trustee in bankruptcy, for the bankrupt corporation and for the original creditors. (Trans. p. 105.) This friendly, harmonious, collusive bankruptcy proceeding would challenge the attention of even a careless examiner of titles. Furthermore, the two bills of sale (Exhibits 12 and 13) as well as the inventory, do not describe any telephone lines capable of location either from the records of the bankruptcy proceedings or from any other recorded conveyances but only, if at all, through oral testimony. The creditors got three per cent. in this proceeding, while, as noted above, in the foreclosure proceeding, they got nothing. It is not strange that Mr. Avery pronounced this title unsatisfactory. It is clearly unmerchantable, at least within

the definition of that term as used by the courts in actions for specific performance.

CIRCUMSTANCES UNDER WHICH THE AGREEMENT WAS MADE.

Under this heading we shall discuss :

(a) The Sherman Anti-Trust Act and Government decree.

(b) That the opinion of appellant's attorney that appellant could not lawfully acquire this property is final herein.

(c) The applicability of the principle *ex turpi contractu non oritur actio*.

Appellee put in evidence a letter written by Mr. West to Mr. Kingsbury in which he said: "You no doubt recall the circumstances under which an agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement with your assurances that it would be carried out." (Trans. p. 57.) The nature of the business at hand was the application to the city council of Spokane for its consent to the consolidation of the two Spokane exchanges. The Government decree, which was familiar to Mr. West, provided that the Bell interests should sell their holdings of stock in the Home Company unless the municipal authorities of Spokane should express their desire for a consolidation of the two exchanges, in

which event a petition might be filed in the government suit asking for a modification of the decree to permit such consolidation. Mr. Kingsbury, vice president of the American Telephone & Telegraph Company, Mr. McFarland, president of the appellant, and Mr. Pillsbury, its general counsel, were in Spokane at the time this letter of June 20, 1914, was written. The time for getting the city's consent had almost expired. The Government decree was entered March 26, 1914, and provided that a petition for consolidation must be filed within three months thereafter. The resolution of the city council authorizing the consolidation was passed June 22, 1914, and the petition for modification was filed June 24, 1914. These documents are in evidence. (Exhibits 20, 23, 24; Trans. pp. 101, 102). The letter of June 20th, dated at Spokane and signed by Mr. MacFarland also explains "the business at hand." That letter (Trans. p. 4) states: (a) That in the event of the consolidation of the two exchanges the appellant agrees to make a contract with the appellee giving the appellee a connection with the Consolidated exchange; and (b) In the event that the appellee desires to sell its property to the appellant and so notifies the appellant within sixty days, an appraisement, etc., shall be made and the appellee will convey to the appellant "that portion of its property which the Pacific Company may lawfully acquire." It is evident that the appellant did not desire to buy this property but that it did desire to avoid harassment on the part of appellee and its Mr. West, and that this letter of June 20th had direct relation to the application then

pending before the city council and the matter of obtaining permission from the council and the court to consolidate the two exchanges, and that is what is referred to in Mr. West's letter wherein he says: "You no doubt recall the *circumstances* under which the agreement was made *and that by reason of these circumstances and the nature of the business at hand* it was left largely in the nature of a *gentlemen's agreement* with your assurance that it would be carried out."

That a court of equity will not exercise its discretion to grant a decree of specific performance under such circumstances would seem to be beyond question.

See *Hazelton v. Sheckells*, 202 U. S. 71.

Hoffman v. McMullen, 83 Fed. Rep. 379 (Ninth Circuit).

Same case, 174 U. S. 639.

One of the circumstances was the fact that the appellee was engaged in interstate commerce in competition with the appellant. That is conceded. The appellee's present contention is that that commerce was not large enough to stay the hand of a court of equity. Whether or not the purchase of this competitor would constitute a violation of the Sherman Anti-Trust Act constituted a question of law and not of fact. Another circumstance was a decree in the Government suit entered in March 1914 and known to the appellee, which decree adjudged that the Bell companies had violated the Sherman law in acquiring independent properties around Spokane and perpetually enjoining them from, directly or indirectly, doing any act or thing in furtherance of the objects and purposes of said com-

bination and from attempting to monopolize said commerce or any part thereof "and from forming or joining any like combination in the future." (Par. III.) Paragraph 11 of the decree refers to the Spokane situation. It also appears from Mr. Kingsbury's letter (Trans. p. 59) that certain promises in relation to buying independent properties had been made to the Department of Justice at Washington. It is alleged in the complaint (Par. VI, Trans. p. 7) that appellant and appellee had discussed the question of violating the Sherman law by this transaction before the letter of June 20th was written. Mr. West concedes in his letter (Trans. p. 57) that because of this situation the contract was not enforceable but merely a "gentlemen's agreement." And we find in that letter (Trans. p. 5) the statement quoted above that the appellant is to purchase, if the appellee desires, that portion of the property which the Pacific Company "may lawfully acquire," the title to be acceptable to the attorneys of the company.

We submit that it was the clear intent of this letter that the legal questions involved should be passed upon by the attorneys for the appellant and that this "gentlemen's agreement" should not be brought into court. That this appellant should not be put in a position by any decision rendered in a case between these parties whereby the Government could say to the appellant that it had violated its agreement with the Department of Justice or had violated the letter or spirit of the decree in the Government suit or had violated the Sherman Anti-Trust Act, but that the question as to what

they might "lawfully acquire" was to be left to and determined by the attorneys for the appellant after they had had sufficient opportunity to investigate the matter. The evidence shows that the attorneys concluded that the appellant could not lawfully acquire this property and Mr. MacFarland so wrote Mr. West and that Mr. MacFarland and Mr. Pillsbury so told him personally. (Trans. pp. 56, 57.)

We submit that the conclusion of the attorneys being neither arbitrary nor capricious is final on that subject; and, second: That a court of equity under these circumstances will not exercise its discretion in favor of a decree of specific performance which may subject the appellant to prosecution, civilly or criminally, by the Government. The Government, not being a party, is of course not bound by this decree. The question as to whether or not the Sherman law was violated may or may not depend upon the amount of interstate business actually heretofore done by the appellee, which we will later discuss, but at this point we call attention to the fact that during the trial the learned trial judge took the position as follows:

"THE COURT: It was admitted they were doing some interstate business. I don't think the extent of the business would make any difference with the Sherman Act." (Trans. p. 78.)

Thereafter he changed his mind on this subject, as shown in his opinion. But no matter which opinion is right it cannot be said that the question is so clear from doubt that a court of equity should by its decree compel us to buy and take title to and pay for this property,

and especially when it is conceded by the learned trial judge that the remedy at law is entirely adequate. (Trans. p. 30.)

That the granting or refusing to grant a decree of specific performance rests in the sound discretion of the court, taking into consideration the equities of the parties under all of the circumstances surrounding the case, was expressly decided in:

Willard v. Tayloe, 8 Wallace 557, 567.

Wesley v. Eells, 177 U. S. 370, 376.

That specific performance will not be decreed when the proof is not clear and convincing as to the terms of the contract and the meaning thereof was decided in:

Colson v. Thompson, and other cases cited above.

Nor when to grant the same would be contrary to public policy:

Beasley v. Texas-Pacific R. R. Co., 191 U. S. 492.

Nor when the remedy at law is adequate:

Hyer v. Richmond Traction Co., 168 U. S. 471.

Even though difficult of ascertainment:

Texas v. Railway Co., 136 U. S. 405.

Sherman Act and Government Decree.

We confidently contend that the purchase of this property would as a matter of law violate the provisions of the decree in the Government suit and the Sherman Anti-Trust Act. Paragraph XI of that decree refers specifically to the situation in eastern Washington and northern Idaho. It recites:

“That for many years the Interstate Company has operated in Washington and Idaho about 512 miles of long distance telephone lines and about 10 exchanges and 190 toll stations; that its main lines are connected in Spokane with the Home of Spokane pursuant to a traffic agreement, and extend thence easterly into Idaho more than 100 miles; *that from these lines branch lines run north and south both in Washington and in Idaho*; and that its patrons can and do interchange communication with the patrons of the Home of Spokane.”

There are other recitals in respect to the competition between this independent system and the Bell system and a special provision forbidding such competition. Paragraph III of the decree recites that the combination was entered into to restrain and monopolize commerce in telephonic communication between Washington and Idaho and Washington and Oregon and specifically perpetually enjoins this appellant and the other defendants “from directly or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combination and from continuing as parties thereto, and from continuing to monopolize, or attempting to monopolize, said commerce or any part thereof, and from forming or joining any like combination in the future.”

In the record is a map showing the lines of the Interstate Company and its branches, including the lines involved herein and the lines of the appellant, and showing that each of these two systems cover practically the entire territory of northern Idaho and eastern Washington in active competition. (Exhibit 16.) The lines in controversy herein constitute one of the

“branch lines” of the Interstate Company. It was not owned by that company but tied up to it with traffic agreements which are in evidence. (Exhibit 17.) The first agreement is dated September 28, 1909, to continue for the period of twenty-five years, and is between the Interstate Company as first party and the Local & Long Distance Telephone Company as second party. Paragraph 1 of that agreement is to the effect that second party agrees to build exchanges in Davenport and other towns and a toll line to Spokane to be connected with first party’s system in Spokane. The second, third and fourth paragraphs provide for such connection and interchange of business. The ninth paragraph provides that the Interstate Company agrees not to compete with the second party along its line between Spokane and Davenport and not to connect with any other telephone company in that territory and that second party shall not compete with first party for telephone business in the territory occupied by first party nor connect with any other telephone company whatsoever. The twelfth paragraph provides that the first party shall publish in its telephone directory a list of all subscribers of the second party and second party shall furnish to its subscribers in each telephone directory it may publish a list of the subscribers and connections of the first party. The thirteenth and fourteenth paragraphs provide that each party will deliver *exclusively* to the other party all long distance messages and conversations covered by the lines of said party. In August 1911 a contract was entered into between the Washington Consolidated

Telephone & Telegraph Company, the Interstate Company and the Home Company of Spokane of similar purport and effect except that the period of that contract is ten years.

It is a matter of common knowledge that the branch lines, and often a part of the main lines, of an operating railroad company, are not usually owned by one corporation. Some times there is control by a majority stock ownership; sometimes there is a lease; sometimes there is an exclusive traffic agreement. The same is true of telegraph lines and telephone lines. Manifestly, the question of legal title to the roadbed of a railroad or the pole lines of a telephone or telegraph company is not decisive in determining either whether a certain line is or is not a branch line, or whether the severance of that line from a railroad system or a telegraph or telephone system and sale thereof to a competitor would violate the Sherman Anti-Trust Act. Clearly, under these contracts, the telephone lines involved herein constituted a part of the system of the Interstate Company and were a branch line thereof. The interstate business of the Interstate Company was not negligible and the purchase by the Bell interests of a majority of the stock of that company violated the Sherman Act. That was conclusively determined by the decree in the Government suit. A violation of that decree by this appellant would be contempt of court and subject it to punishment. Of course no court of equity would compel the appellant to violate the other decree.

It is conceded that interstate business was being done by the appellee. The amount of that business is not material. The amount of the business of the Interstate Company may be material and there has been a judicial determination of that question. Every trunk, whether railroad, telegraph or telephone, must have many branches. Each branch contributes to the life of the trunk. To hold that each branch may be cut off, one at a time, without violating the Sherman Act, by considering solely the amount of business done by each branch separately, and thereby the efficiency of the trunk materially decreased, would make an absurdity of the Sherman Act.

The contracts provide for further extensions in that prosperous section of the State of Washington partly covered by the Davenport line. The development of the resources of the country and the increase of population and the extension of this line mean greater interstate business. That competition actual and potential is thus destroyed. That these contracts and the connection through the Home of Spokane with the Interstate Company and the right to do business with northern Idaho are shown to be a matter of real importance to the Davenport line as well as the Interstate line by the contracts themselves (Exhibit 17) and by the testimony of Mr. West and the admission of his counsel (Trans. p. 78). A statement of the amount of the business actually done for six months before the trial is set forth in Exhibit No. 19. While that amount is not large, that fact is not conclusive, we think, under the Sherman Act and certainly not material so far

as the effect of the Government decree is concerned. We think that the trial judge's opinion given during the trial is the better one. He said (Trans. p. 78):

"It was admitted they were doing some interstate business. I don't think the extent of the business would make any difference with the Sherman Act."

In *United States v. Union Pacific RR. Co.*, 188 Fed. p. 102, the court decided against the United States, partly at least, because of the smallness of the competitive business, saying at page 116:

"The aggregate of all the business done by the Union Pacific and Southern Pacific companies over all these routes for the years specified, which we believe fairly represent the general conditions prevailing at or before the Huntington stock was purchased, was, for the Southern Pacific Company, 0.88 per cent. of the entire tonnage of that system, and for the Union Pacific Company, 3.10 per cent. of its aggregate tonnage. Tables in evidence also disclose that the total revenue derived from the traffic over these minor routes by the Southern Pacific Company for the year preceding the year of the Huntington purchase amounted to only 1.25 per cent. of the total revenue of that system."

The Supreme Court of the United States held that although this business was comparatively small the Sherman Act was violated.

United States v. Union Pacific, 226 U. S. 61, 88.

Adequate Legal Remedy.

Section 723 of U. S. Revised Statutes provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case

where a plain, adequate and complete remedy may be had at law."

The learned trial judge conceded that the remedy at law was adequate (Trans. p. 30), saying:

"Viewed from the standpoint of the plaintiff alone there would seem to be an adequate remedy at law by an action for damages, the measure of damages in such cases being the difference between the contract price and the fair market value of the property. True, there might be some difficulty in proving the market value, but that is an ever present difficulty in all kinds of litigation."

He then holds that if the appellant as vendee had brought this action the remedy at law would have been inadequate and it would have been entitled to specific performance and under the doctrine of mutuality of remedy the appellee is entitled to the same remedy.

We think that the question is concluded by the United States Supreme Court in the case of *Hyer v. Richmond Traction Co.*, 168 U. S. 471. In that case the complainant was an applicant for a street railway franchise. An ordinance granting such franchise was passed but the terms thereof were unsatisfactory. Plaintiff was assured that certain modifications would be made provided he made certain money deposits, which were made. He then learned that the defendant was seeking a similar franchise. Subsequently a banking house, which contemplated aiding the enterprise, advised a consolidation of the two interests and a contract was entered into whereby such consolidation was made, each agreeing to have a half interest in the en-

terprise. An ordinance was passed naming the defendant as grantee of the franchise. The plaintiff performed his part of the agreement and being ignored by the defendants, who formed a corporation, brought an action for specific performance and therein prayed "that he be decreed the owner of one-half interest in the Traction Company's franchise, property and stock, and specifically for certain orders to secure to him the possession and enjoyment of such interest." (p. 476.) The court said, at page 483:

"But even if it be considered as a contract specifically for the transfer of stock, what is the rule in respect to actions in the case of a breach thereof? If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of agreement to sell, but in cases where stock has no recognized value, is not purchaseable in the market or has a value which is not settled, but is contingent upon the future workings of the corporation, equity will sometimes decree specific performance of the contract to purchase. It is in reliance upon this that plaintiff claims the right to a decree for specific performance. The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the interest he claims, can adequate compensation be secured. At the same time the present value of the franchise, and therefore of the stock of the corporation owning the franchise, is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the popu-

lation adjacent to the line, and therefore, the number of people likely to avail themselves of its advantages, the cost of construction and operation, are all well known facts, as upon such known facts it is not impossible for a jury to form a fair estimate of the value of the franchise, and therefore of the damages which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it."

A decree was entered dismissing the bill. Mr. Justice Brewer wrote the opinion. Mr. Justice Harlan wrote a short concurring opinion holding that the contract was detrimental to the public interests; that the ordinance named the grantee, and "Aside from these considerations, I am of opinion that if the plaintiff has any remedy at all, he has an adequate one at law. Upon this last ground I acquiesce in the judgment of the majority of the court in this case." Mr. Justice Brown, with whom concurred Mr. Justice Peckham, wrote a dissenting opinion holding that specific performance should be granted because "The corporation was but recently formed, the railroad yet unconstructed, and its shares of uncertain value, if indeed they had any marketable value at all."

We submit that under the doctrine announced in this case that if this appellant were complainant suing for specific performance, the same would be denied without regard to the uncertainty of the contract because of the adequacy of the remedy at law coupled with the fact that the vendor was engaged in interstate commerce in competition with the complainant, which competition would be destroyed, and because of

the letter and spirit of the Government decree and the circumstances surrounding the agreement and the fact that the parties themselves did not deem it to be a binding contract but merely a "gentlemen's" agreement.

MR. WEST NOT AUTHORIZED TO MAKE A CONTRACT.

It is elementary learning that neither the directors or a majority of the stockholders have power to sell all the corporate property of a solvent concern except by unanimous vote of all the stockholders.

See *Cook on Corporations*, 7 Ed. Vol. 3 §670
and cases there cited.

Appellee sought to prove this authority, offering in evidence certain minutes (Trans. p. 44), said minutes being those of the board of trustees, dated June 4, 1914. Witness later testified that the minutes were wrong because the meeting was held on June 30th; that the recital in the minute that the offer made by appellant was on May 20th should have been June 20th (Trans. pp. 60, 61); and that he did not write these minutes until just a few days before the trial (Trans. p. 62). The by-laws provide that the regular meeting of the board of directors is held on the first Monday in each month, which would not be on June 4th but June 1st. (Trans. 83). There is no minute of a meeting held on June 1st nor of one held on June 30th. All the trustees or directors were not present at this meeting, if one was held. (Trans. p. 45). Mr. West, on cross-examination,

testified that the company was entirely solvent (Trans. p. 63) and exhibited a resolution passed at the stockholders' meeting held in January 1914 purporting to authorize the trustees to negotiate for the sale or lease of the property (Trans. pp. 64, 65), but at that meeting *less than two-fifths* of the stock was present or represented (Trans. p. 65).

We therefore contend that under settled principles applicable to a solvent going concern that Mr. West was not authorized to sign the letter of August 10, 1914, set out in the complaint (Trans. pp. 5, 6), nor was any contract for the sale of the property entered into which was binding upon the appellee. If the appellant had brought an action for specific performance against the appellee that action would have of necessity failed for that reason, as well as for other reasons elsewhere referred to herein.

We respectfully submit that appellant is entitled to a decree dismissing this action.

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PILLSBURY, MADSON & SUTRO,
of Counsel.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a Cor-
poration,

Appellant,

vs.

D A V E N P O R T I N D E P E N D E N T
TELEPHONE COMPANY,

Appellee.

2693

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

Brief of Appellee

Filed
FEB 28 1916

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Attorneys for Appellee.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a Cor-
poration,

Appellant,

vs.

DAVENPORT INDEPENDENT
TELEPHONE COMPANY,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

Brief of Appellee

The brief of appellant is involved and confusing,
as if it was the purpose to muddy the waters rather
than to present clearly and perspicuously the ques-

tions involved. This imposes on the appellee the necessity of treating the case independently and presenting it much the same as it was presented in the District Court.

The case involves a contract for the sale of a telephone plant and system, consisting of approximately three hundred miles of telephone wires, strung on poles in Lincoln County and Spokane County, Washington, reaching and serving the residents of said counties, together with a local exchange at Davenport in Lincoln County, and with storage batteries, motor generating set, battery switch boards, harmonic converters, and the usual equipment of such a system, and also a large amount of supplies of various kinds necessary to be kept for such a system. The contract was wholly in writing and consisted of a letter from the appellant offering to purchase, a letter from the appellee accepting the offer, an appraisement of the reproduction value of the physical properties made by the appraisers appointed for that purpose by each party, under and in accordance with the terms of the letter of appellant making the offer of purchase. These letters and the appraisement made thereunder are set out in the bill of complaint and admitted in the answer. The only material matter of fact in the complaint put in issue by the answer is that of ownership on the part of the appellee and its ability to make to appellant a good marketable title to the properties. The answer sets up various affirmative defences which will be noticed in their order, but which do not call for comment at this time.

The questions presented on the bill of complaint and answer and the testimony, and which the appellee must sustain affirmatively, are:

First. Was the contract sufficiently certain to warrant specific performance?

Second. Do the proofs show the ability of appellee to make a good marketable title?

Third. Is the case one for specific performance under the principles governing the equity jurisdiction of the Federal Courts?

We address ourselves to these questions before discussing those devolving affirmatively on the appellant.

ARGUMENT.

First. Was the contract sufficiently certain to warrant specific performance?

The contract was assailed for uncertainty in the District Court on almost every imaginable ground, as well as that it constituted no contract, that it was without consideration, and that it was insufficient and void under the statute of frauds. The appellant has abandoned these contentions in this court, and plants itself on the single proposition that the contract is uncertain in that it does not specify whether all or only a portion of the property of the appellee was to be conveyed, and if only a portion, what particular portion.

The ingenious argument advanced by appellant on

this point, and the authorities cited which we do not controvert, falls to the ground when looked at in connection with the offer of purchase made by the appellant. That offer was in these words:

“In the event that the Davenport Company desires to sell its property to the Pacific Company and so notifies the Pacific Company in writing within sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by one of our engineers, representing this company, and in the event of your failure to agree with our representative, the value to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.”

The offer was for all the properties of the appellee, at a price to be fixed by appraisers, but to be fully complied with by the conveyance of such portion thereof as the appellant might lawfully acquire. Now, where is the uncertainty? The matter was not left open to further parley between the parties because the appellee had agreed to convey all its property. It was not a matter to be determined by the preconceived view of attorneys on either side, as suggested by appellant, because the legal rights of suitors are not foreclosed in that manner. Clearly it was a matter for the determination of the appellant alone. It could take all the properties if it thought such a purchase in-

nocuous to the law. If it doubted its right to purchase all, it could take any part that it conceived it had a right to take. Can it be said that there is any uncertainty in a contract of purchase which gives the right to purchase, for a certain specified sum, all of a specified list of properties or such part thereof as the vendee may choose to take? Such a contract simply confers an election on the purchaser to be exercised by him at his option. Absolutely no will was to be consulted under this contract, but that of the appellant. The contract stood for all or a part, as the appellant itself might determine. Whether a court of equity will refuse to decree the specific performance of such a contract on other grounds is another question, to be considered later; but that the contract is uncertain, cannot, we submit, be successfully maintained.

But the contract must not only be certain to the apprehension of the parties, but it must be so certain and definite in its terms that the court, on the refusal of either party to comply, may make an intelligent decree for its performance.

Does this contract possess that decree of certainty? If the appellant had been the actor and had come into court for a specific performance, alleging either that it might lawfully acquire the whole of the property, or that it might lawfully acquire a part thereof, and praying specific performance in whole or in part as the case might be, it could not have been said that there was such uncertainty as to what it had agreed to do, or what the appellee had agreed to do, that specific

performance would have to be denied. The appellant had agreed to pay the reproduction value of all the properties. The appellee had agreed to convey all or any part of the properties that the appellant might conceive it had a right to purchase, and its election on that point, we submit, could not have been contested. Manifestly if the contract is sufficiently certain for the purposes of the appellant it must be for those of the appellee. There must be mutuality.

On this bill brought by the appellee there were two courses open to the court for the determination of the property to be conveyed.

(a) It could have required the appellant to elect whether it would take all or only part of the property, as it would have been required to elect if it had been the moving party.

(b) It could go on and determine for itself whether appellant might lawfully acquire all, or only a portion, of the property, and make a decree accordingly. *Est certum est quod reddi certum potest*. The lawfulness or unlawfulness of a thing certainly ought to be capable of determination by a court of law. That is what courts are for.

Nor is it unknown to the practice in specific performance cases to refer such questions to the courts for their determination. In a case arising during the civil war, in which the question was whether the vendee should pay the purchase price in gold, or in legal tender notes, the Supreme Court of the United States said:

“The defendant, it is true, insisted upon his right to payment in gold, but before the expira-

tion of the period prescribed for the completion of the purchase, he left the city of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

“Nothing further could have been reasonably required of him under the circumstances, even if we should assume that the act of Congress, making the notes of the United States a legal tender, does not apply to debts created before its passage, or, if applicable to such debts, is, to that extent, unconstitutional and void.

“In the case of *Chesterman vs. Mann* (9 Hare, 212), it was held by the Court of Chancery of England, that where an underlessee had a covenant for the renewal of his lease, upon paying to his lessor a fair proportion of the fines and expenses to which the lessor might be subjected in obtaining a renewal of his own term from the superior landlord, and of any increased rent upon such renewal, and there was a difference between the parties as to the amount to be paid by the underlessee, he might apply for a specific performance of the covenant, and submit to the court the amount to be paid. So here in this case, the complainant applies for a specific performance, and submits the amount to be paid by him to the judgment of the court.”

Willard vs. Tayloe, 8 Wallace, 557, at 569 & 570.

The court in this case took the view that it was lawful for the appellant to acquire all the properties, and hence it was unnecessary to resort to the first alternative suggested, namely, that of election. We will deal with that phase of the controversy later in this brief, but we submit, that the peculiar limitation put into its offer of purchase by the appellant, being a limitation capable of definite ascertainment, was not such as to render the contract unenforceable in an action for specific performance. Vagueness and obscurity resulting from the use of general expressions are, as stated by Mr. Pomeroy, obviated by the legal implications. (Pomeroy on Contract, Specific Performance, Section 161).

The contract is sufficiently certain if it be as full and definite in its description of the property as the description required in a deed of conveyance. Pomeroy on Contracts (Specific Performance), section 136.

A description in a deed in the following words: "One half of my lot" was held to be sufficient when aided by proof that the grantor owned but one lot. *Lick vs. O'Donnell*, 3 Cal. 59.

"All lands and real estate belonging to the said party of the first part, wherever situated," was held a sufficient description in another case. *Pettigrew vs. Dobbelaar*, 63 Cal. 396.

It may conduce to clearness to explain at this time the reason for the limitation placed by appellant on

its offer of purchase. It was a large owner and operator of telephone lines on the Pacific coast. It had already gotten into difficulties with the Government by reason of its efforts to purchase and combine telephone systems engaged in interstate business. The bulk of lines of the appellee consisted of local lines, engaged in a strictly intrastate business, radiating out of Davenport, in Lincoln County, and not extending beyond the borders of that county. With respect to those local lines the appellant had no lines that came into competition, but it had a line from Spokane to Davenport, which interchanged business with still another local system in Lincoln County under an agreement revocable by appellant at pleasure. The appellee also had a toll line forty miles long extending from Davenport to Spokane, and connecting with the Home Exchange in Spokane. To the extent that this latter line did an interstate business, the appellant, if it was honest in its offer of purchase, and ever intended to carry it out, may have thought that that particular part of appellee's line was an interstate competitor with it, and that it had no right to purchase that particular part of appellee's lines. Hence the offer of the reproduction value of the entire system for such portion thereof as the appellant might lawfully acquire. The toll line of the appellee, constituting only about one-eighth of all its lines, and the purchase price being based on reproduction cost, and including nothing for franchises, good will, etc., the proposition may very well have appealed to the purchaser, even if it found it could not

receive the line of the appellee extending from Davenport to Spokane. The bill of complaint and answer, and the testimony, aided by public and notorious facts of which the Court will take judicial notice, bear out this statement and the conclusions drawn therefrom.

Second. Do the proofs show the ability of the appellee to make a good marketable title?

On this point we desire to make this preliminary observation: The contract was one for the purchase of a public utility system. The offer was to purchase it as it stood. The parties must have contemplated necessarily that the property and property rights, including franchises, would be found in varying states of perfection as to title, and that they should be taken by the purchaser in the condition in which the seller then held them. It is impossible to apply to such a transaction the strict rules as to marketable title held with respect to sales of real estate. In such a transaction, unless there be warranties or guaranties or specific representations, none of which are shown here, the purchaser takes the property *cum onere*. We have found no authority on this point but the proposition is so reasonable, and so necessary if a sale of such a property is ever to be consummated, that it must be the law. The stipulation as to title in such a case is not broken by every little defect or imperfection that may appear, or even by grave defects, if it be shown that the vendor was in possession of the system and operating it under a claim

of right, and under a title which, if not perfect, was yet sufficient to protect the purchaser from any reasonable probability of attack from third persons. For this purpose time and circumstances, limitation and estoppel, all ought to be considered. We make these observations, not that the protection of the principle suggested is necessary in this case, but in order that the investigation may be entered on with the proper view point of what in our opinion constitutes a marketable title in such a case.

Proceeding now to the question of title, the record shows that a part of the telephone system was acquired by grantors of the appellee by purchase at a sale conducted under an order of sale issued by the Superior Court of Spokane County in the foreclosure suit of the Washington Trust Company against the Local and Long Distance Telephone Company. The Local and Long Distance Telephone Company was the owner of the properties, but had incumbered them by a mortgage to secure an issue of bonds. When the latter company first fell into difficulties a creditors suit was brought against it in the Superior Court of Lincoln County, a receiver was appointed, and ultimately a sale of the interest of the Local and Long Distance Company was had in that suit, at which sale one H. H. Reynolds purchased the properties. The Washington Trust Company was not a party to that suit and its rights under the mortgage made to it were not affected. When, however, it brought its foreclosure suit it

made H. H. Reynolds a party, alleging that he claimed some interest in the property. Reynolds, it appears, was never served with process in the foreclosure suit, but the court in the latter suit went on and adjudicated his rights, holding that his purchase was subject to the mortgage and decreeing that he be foreclosed of any interest in the property. It is insisted that this state of facts shows such a defect as to make the title not marketable. There are two answers to this contention.

(a) It is manifest that Reynolds' purchase at the Receiver's sale, gave him no rights as against the mortgagee under the prior mortgage. The appellee being in possession under a sale enforcing that mortgage, Reynolds could never contest its title without coming into court and doing equity, which would require him to pay off the mortgage amounting to a very large sum. If we are not mistaken the record shows the sum to have been two hundred thousand dollars. So if the matter stood as the record in the Superior Court of Spokane County left it, the objection to the title urged is fanciful and chimerical and such as a court of equity ought not to listen to in this case. We insist again that the rule as to what constitutes a marketable title in the case of real estate sales cannot be applied to such a case as this.

(b) In the foreclosure suit the Washington Consolidated Telephone & Telegraph Company was also made a party, with an allegation that it claimed some

interest in the property, and the decree in that suit foreclosed whatever interest it had. The record in this case shows that whatever interest Reynolds acquired at the Receiver's sale, he had conveyed to the Washington Consolidated Telephone and Telegraph Company by bill of sale dated May 8, 1911, more than a year before the decree in the foreclosure suit. (See Plaintiff's Exhibit 4). So that it is shown in this case that Reynolds had no interest in the property at the time of the foreclosure, and that his grantee, to whom he had conveyed his interest, was a party to the foreclosure, regularly served, and that it was duly foreclosed. This ought to quiet the anxiety of the appellant, but it does not. It insists that Reynolds' bill of sale in 1911 does not negative that he was the owner of the property in 1912, at the time of the foreclosure. His purchase at the Receiver's sale was prior to the bill of sale. That purchase was the only foundation for conceiving that he had an interest in the property, and when his bill of sale shows that he parted with that interest, the presumption is, until the contrary is shown, that his status remained as the bill of sale left it. We do not consider it necessary to cite authorities to a principle of evidence so elementary.

The court in the foreclosure suit did not, as appellant insists, adjudicate that Reynolds was the owner of the property in 1912. The findings of fact, which it is well to remember, are no part of the judgment roll, simply found that he had purchased the property at

the Receiver's sale, but that he had purchased it subject to the mortgage. The extravagant claim of the appellant as to the findings of the court in the foreclosure suit will vanish into thin air, when the findings of fact are looked into. They are certified to this court as an exhibit, but unfortunately are not printed with the record, and appellee cannot in their absence quote from them on this point as it would like to do. The opinion of His Honor, Judge Rudkin, in the lower court, places this matter in its true light, as follows:

"The court found in substance that Reynolds purchased the mortgaged property at receiver's sale; that the report of the receiver was filed and the sale confirmed on the 1st day of May, 1911; that Reynolds bought the property with full notice of the trust deed, for less than its actual value, and that his purchase was subject to the trust deed and burdened with the lien thereof. Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in this way. There was introduced in evidence at the trial, however, a bill of sale from Reynolds to the grantor in the trust deed bearing date May 8, 1911, and this bill of sale would divest him of any title acquired at the receiver's sale. It was suggested in argument that the finding above referred to was made on the 31st day of May, 1912, more than a year after the execution of the bill of sale, but the finding in favor of Reynolds, as well as the finding against him, in a proceeding to which he was not a party, must go for naught. If there is any evidence in the record that Reynolds had an interest in the property at any time, there is likewise evidence that he conveyed that interest at a later day and no evidence that he now has or claims such interest."

The only further objection urged against the title obtained at the foreclosure sale is that the franchises, which the decree ordered sold, and which the sheriff did sell and undertake to convey by his bill of sale, were not advertised in the manner required by law. That the franchises were not so advertised must be admitted, but there are several answers to the contention that that renders the appellee's title, tendered under its contract with appellant, unmarketable.

(a) Requirements as to the steps to be taken on execution sales are directory. If there is a valid execution on a valid judgment that is all the purchaser need look to. Failure to comply with the requirements is a matter between the sheriff and those injured by his failure to take proper steps.

Smith vs. Randall, 6 Cal. 50.

Blood vs. Light, 38 Cal. 302.

Frink vs. Roe, 70 Cal. 302.

Where the court has jurisdiction and power to issue execution, a sheriff's deed cannot be attacked collaterally.

Bales vs. Johnston, 23 Cal. 226.

Carley vs. Morgan (Ind.), 12 N. E. 790.

Stetson vs. Freeman, 35 Kan. 523; 11 Pac. 431.

Diamond vs. Turner, 11 Wash. 192.

Oakes vs. Williams, 107 Ill. 154.

And where the judgment debtor waits until after the right to redeem has expired, his right to move against the sale is gone.

Wiltze on Mortgage Foreclosure, Sec. 574, p. 692.
Clark vs. Glass (Ill.), 54 N. E., 368.
Leinenweber vs. Brown (Ore.), 34 Pac. 475.

(b) The record shows that the City Council of Davenport and the County Commissioners of Lincoln County, by resolution, recognized the appellee as the successor in interest to the franchises granted to the Local and Long Distance Company.

Plaintiff's Exhibit No. 3.

Plaintiff's Exhibit No. 11.

The resolution of the City Council of Davenport was submitted to Mr. Post, appellant's attorney, and pronounced satisfactory by him before its passage.

Record testimony, p. 47.

Moreover, so far as the franchise to maintain and operate lines of telephone over the county roads is concerned, that is granted by the laws of the state to any company or individual.

"Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: Provided, that when the right of way of

such corporation has not been acquired by or through any grant or donation from the United States, or this state, any county, city, or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law: Provided further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

Section 9314, Remington & Ballinger's Annotated Code.

Another and later statute makes other and somewhat contradictory provisions (Section 5612, Remington & Ballinger's Code), but the later statute contains the provision: "this act shall be construed as an addition to existing laws and shall not limit powers or rights which may be exercised under existing laws."

It is manifest from the foregoing that as to the county roads, it is wholly immaterial whether the franchises were properly sold by the sheriff. On the acquisition of the physical properties the right to maintain and operate the lines attached as a matter of law, and as to the franchise to operate the local exchange in Davenport, any defect as to that was cured by the resolution of the council of that city submitted to and approved by Mr. Post.

(c) Lastly, the appellee did not agree to sell and

convey any franchises. It agreed to sell "its property," which meant its physical properties. This is shown by the stipulation that "an appraisement shall be made of the reproduction value, new, of the property," and by the conduct of the parties in making the appraisement. "It (the inventory) includes no mention of franchises, good will or other property than the property of the company. It includes only the physical property." (Testimony, A. T. West, Record p. 46).

It would be a severe rule indeed that would defeat the recovery of the appellee in this case because of some defect in the matter of franchises, not considered by either party at the time the contract was entered into, for which appellee was to receive no compensation, and which was treated as a negligible quantity by both parties in the making of the inventory and appraisement.

The remainder of the telephone system was acquired by the grantors of appellee at bankrupt sale in a proceeding of involuntary bankruptcy brought against the Washington Consolidated Telephone and Telegraph Company by three of its creditors. The brief of appellant is not clear as to the exact objection to the title acquired at the bankrupt sale. After reading the brief over repeatedly we are unable to formulate in a clear and intelligible manner the objections taken. In this dilemma we are compelled to resort to the testimony of Mr. Avery, one of the appellant's attorneys,

with respect to the objections found by him to the title. He said:

“My objection to the bankruptcy proceedings was I thought that the stipulation of the petitioning Creditors and the alleged bankrupt that the proceedings might be dismissed prevented any further action by the Court. At that time there was no trustee. There must have been in contemplation a trustee, although the office may not have been filled. My idea of it was this, that in the first place it was competent to make a stipulation of that kind, and when they declared in the stipulation that the claim was satisfied and discharged, I thought they had a perfect right, or at least I thought it probable, that they had the right to dismiss and so stipulated, and the Court could enter no other order on the subject of stipulation; but in the event that was not true, I felt very sanguine they could not resurrect and resuscitate the case without notifying the one most interested. I do not think there is any jurisdiction, not at least without notice, after the bankrupt has stipulated to dismiss the case. After a case has gone for adjudication, it is for the benefit of the whole world, and they may come in and file claims. I think an *ex parte* order for the case to proceed could not be made without a stipulation by or notice to the bankrupt. I thought the bankruptcy case was deficient in the description of the property. I would not like to say I thought the general description of the property would render void an order of the referee in bankruptcy made at a later period, ordering the sale of all the property, but I thought it rather defective. I would not say that it would be void, but it was not at all satisfactory as a description of the title.”

Testimony of A. G. Avery, Record pp. 98-99.

Answering now the objections of Mr. Avery, we

submit that after an order adjudicating bankruptcy, title to the property of the bankrupt vests in the Trustee in Bankruptcy for the benefit of all creditors, and that it is not then competent for the petitioning creditors and the bankrupt to agree that the proceedings be dismissed. (Section 70 of the Bankrupt act, Federal statutes Annotated, Vol. 1, p. 697).

There can be no composition without the consent of all the creditors. (Section 11, of same act).

The stipulation for dismissal was a vain and futile thing, which did not stay the hands of the court, and it and its subordinate officers might have proceeded notwithstanding the stipulation, and without any order *ex parte* or otherwise. The bankruptcy proceeding passed regularly through its several stages to the sale of the bankrupt's property, and that was as far as the purchaser of the property was required to look. The fact that the District Judge made an *ex parte* order requiring it to proceed, after the futile effort of the parties to stop it, cannot in any way militate against the regularity of the proceedings.

The other objection of Mr. Avery we do not notice because Mr. Avery conceded that it was not vital. He said: "I would not like to say that I thought the general description of the property would render void an order of the referee in bankruptcy, but I thought it rather defective. I would not say that it was void, but it was not at all satisfactory as a description of the title."

Judge Rudkin thus disposes of all the objections to the title acquired at the bankruptcy sale:

"On the 13th day of May, 1913, a stipulation signed by the attorneys for the petitioning creditors and the bankrupt to the effect that the proceedings should be dismissed on the ground and for the reason that the claims of the petitioning creditors had that day been fully settled and satisfied was filed. No further proceedings appear to have been taken in the bankruptcy court until an *ex parte* order was made on the 23rd day of October, 1913, directing the officers of the bankruptcy court to proceed with the administration of the estate. Attorneys for petitioning creditors in bankruptcy do not seem to realize that they have no control over the proceedings after the adjudication is made. The stipulation was never called to the attention of the Court and was wholly authorized and without force or effect. The order made in October simply required the officers of the bankruptcy court to proceed with the administration of the estate, a duty imposed by law without order or direction from the Court. There is no merit, therefore, in the claim that the Court lost jurisdiction by reason of the stipulation or otherwise. What has already been said as to the sufficiency of the description contained in the memorandum of sale disposes of the objections to the sufficiency of the descriptions in the bankruptcy proceedings. The fact that the trustee in bankruptcy repurchased the property from the purchaser at the bankruptcy sale soon after the bankruptcy sale was made does not affect the title at law or in equity, unless such repurchase was made in pursuance of an agreement entered into before the bankruptcy sale took place. The proof shows that such was not the case. I see no substantial objection, therefore, to the title acquired through the bankruptcy court."

Record, pp. 34-35.

Third. Is the case one for specific performance under the principles governing the equity jurisdiction of the Federal Courts?

The equitable jurisdiction to decree specific performance depends on the same factor with respect both to lands and chattels—inadequacy of damages at law.

Pomeroy on Contract, Sec. 7, p. 8.

Inadequacy of damages is found in both cases where the subject matter of the contract is of such a special nature or of such peculiar value that damages would not be a just and reasonable substitute for specific performance.

Pomeroy on Contracts, Sections 8, 9, and 10.

As stated in Section 10:

“The different modes of treating the two kinds of contracts does not result from any different qualities inherent in the nature of lands and chattels, but from matters incidental and collateral to the subject matter. When therefore these incidental circumstances are found in contracts relating to chattels the contract will be specifically enforced.”

For specific instances see *Pomeroy*, Section 15 and notes.

To the same effect see *Express Co. vs. Railroad Co.*, 99 U. S. 200.

Specific performance decreed in following cases:

Contract for water for irrigation. *Colorado Land & Water Co. vs. Adams (Colo.)*, 37 Pac. 40.

Ships. *Hurd vs. Groch* (N. J. Chy.), 51 Atl. 278.

Patent rights. *Telegraph Inc. Co. vs. Canadian Tel. Co.* (Maine), 69 Atl. 768.

Sale of wood for Wood Pulp Mill. *St. Regis Paper Co. vs. Santa Clara Lumber Co.* (N. J.), 65 N. E. 968.

Clearly the vendee in this case might have had specific performance. There was only one telephone system in the world situated just like this one, and the vendee, having bargained for it, would have been entitled to the aid of a court of equity in getting it. Damages would not have been adequate. It would have been entitled to the specific thing bargained for. Now this being so, it is well settled in equity that where the vendee may have specific performance the principle of mutuality requires that the vendor have the same remedy.

Pomeroy on Contract, specific performance, section 165. Pomeroy's Equitable Remedies, Vol. 2, Section 747.

This principle prevails in the Federal Courts, notwithstanding section 723 of the Revised Statutes inhibiting suits in equity where a plain, speedy and adequate remedy may be had at law.

Cathart vs. Robinson, 5 Peters, 264.

Raymond vs. San Gabriel Land & Water Co., 53 Fed. 885.

Mr. Justice Brewer thus states the influence of that statute, in another class of cases it is true, but his language is equally applicable to specific performance:

“Section 723 has never been regarded, however, as anything more than declaratory of the existing law, *Boyce vs. Grundy*, 3 Pet. 210, and as was said in *N. Y. Guaranty Co. vs. Memphis Water Co.*, 107 U. S. 205, 210, ‘was intended to emphasize the rule, and to impress it upon the attention of the courts.’ It was not intended to restrict the ancient jurisdiction of court of equity, or to prohibit their exercise of a concurrent jurisdiction that had been previously upheld.”

Wehrman vs. Conklin, 155, U. S. 323.

The case of *Hyer vs. Richmond Traction Company*, 168 U. S. 471, cited and quoted from by appellant on this proposition, is not apposite. Neither party was entitled to specific performance in that case, under the view taken by the court, and there was no question of mutuality of remedy.

We proceed now to contentions of appellant as to which the burden, if not on it, is at least as much on it as on the appellee.

First. Discretion of the Court to decree specific performance.

From pages 38 to 43 of its brief is found a discussion of certain facts and alleged facts which it is insisted ought to move the discretion of the court to refuse specific performance.

Referring to a letter written by Mr. West to Mr. Kingsbury, to the activity of the appellant to secure the consent of the city of Spokane to a consolidation in its interest of the Bell and the Home exchanges in Spokane, and to the dual character of the proposal made by the appellant to the appellee, the brief proceeds as follows:

“It is evident that the appellant did not desire to buy this property but that it did desire to avoid harrassment on the part of the appellee and its Mr. West, and that this letter of June 20th had direct relation to the application then pending before the city council and the matter of obtaining permission from the council and the court to consolidate the two exchanges, and that is what is referred to in Mr. West’s letter wherein he says: ‘You no doubt recall the circumstances under which the agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen’s agreement with your assurance that it would be carried out.’ ”

The suggestion is then made that a court of equity ought not to exercise its discretion in aid of a contract so oppressively obtained.

That Mr. West was concerned about the question of consolidation of the exchanges, inasmuch as his suburban system connected with one of them, and that he had an interest in having the permission for such consolidation made on terms that would protect his own system and others similarly situated, is no doubt true. But the conclusions drawn therefrom that the offer of purchase of his system was extorted from appellant by unfair or oppressive measures, is gratuitous and

wholly unsupported by anything in the testimony. If the facts indicate anything in the nature of covin and deceit and the high hand, they point to the appellant and not the appellee as the guilty party. It appears plain from their after conduct that they never intended to carry out the contract of purchase. Post, their attorney, with whom Mr. West conferred, and upon whose representations he largely relied before employing and consulting with an attorney of his own, told him that the papers constituted no contract on general principles of law, that there was no consideration, that there was no question but what the contract was invalid as against the anti-trust law, and intimated that he, West, was likely to get in jail if he insisted on its being carried out. (Testimony of A. T. West, Record p. 76). It was under the influence of these representations, and before he had been properly advised, that Mr. West wrote the letter to Mr. Kingsbury quoted from—a very proper letter and one that suggested how the contract might be carried out without the slightest violation of the anti-trust law, a suggestion that would have been adopted if appellant had ever purposed to carry out its offer of purchase. And finally, after all its hypocritical protestations of good faith, and its specious falling back on the laws of the government which it professed to respect but had been engaged in evading and violating for years, we find it when hauled into court practically abandoning the contention of disablement by law, and interposing every possible species of technical obstacle to the carrying out of its voluntary contract. Now, we say

that the transaction bears quite another complexion than that insisted on by the appellant. The appellant, desiring to get rid of Mr. West's just interposition in his own interest in the matter of a consolidation ordinance, made the offer to purchase his system intending thereby to neutralize his interest, and without the slightest intention of ever carrying out its offer. Fraud covin and deceit has marked its course throughout, while that of Mr. West has been marked by good faith in every particular, unless the court can say that he ought to have been deaf to the voice of the tempter and sacrificed his own interest in the larger interest of the public. We know of no principle of law that required him to do that. The appellant now finds itself hoist with its own petard, and the suggestion comes from it with a very bad grace that it be protected from the consequences of its covinous conduct by the benevolent discretion of this Court.

Another ground upon which the discretion of the Court is invoked is the decree against the appellant in the Portland suit, as to which the appellee was no party and had no knowledge other than the general knowledge of everybody that the appellant had been found guilty of lawless conduct and had been disciplined by the government; the commitment made to the Department of Justice by the appellant as the result of the exposure of its lawless conduct; and the fear that one or the other of these obligations might be violated as shown in the limitation contained in the offer of purchase that the appellant would take only

that portion of the property "which the Pacific Company may lawfully acquire." So far as the Portland decree is concerned the appellant has thus far failed to show any of its provisions that the contract with appellee violated. Moreover, that decree was in existence when appellant made the contract with appellee and it knew the terms of the decree while the appellee did not. So far as the commitments to the Attorney General are concerned, the appellee knows nothing about them and is not concerned with them. Nor is it concerned with the decree. To neither was it ever a party. The matter is only important here in one aspect. Can a party who has contracted with another, with knowledge that he has obligations to third persons, set up the fear that his contract may interfere with those obligations, as ground to move the discretion of a court of equity to refuse specific performance of the contract? Courts are moved by the inequity of contracts to refuse specific performance, and some times by change of situation for which neither party is at fault; but where is there either in this case? Where is there any inequity, except the inequity of the appellant, if it has made a contract with its eyes open which conflicts with its decretal or voluntary engagements with the government? Where is there any change of situation which should move the discretion of the court? It is almost a waste of words and an imposition on the Court to take up any time discussing the proposition. The most amazing position of all advanced by appellant in this connection, is that "it was the clear intent of this letter (the offer of pur-

chase) that the legal questions involved should be passed on by the attorneys for the appellant, and that this 'gentlemen's agreement' should not be brought into court." Inasmuch as no attempt is made to support the proposition by reason or authority we will take up no time in discussing it, but we cannot forbear an expression of commiseration for the unfortunate individual who has entered into contractual relations with this appellant and submitted his rights to be "passed on by the attorneys for the appellant."

There is one feature of the contract that calls for a word—that which obligates the appellant to pay for the whole, when it might receive only a part of the property. Concerning that, we might rely on the fact that there is no valid objection in law to the defendant receiving title to the whole of the property. But if we are mistaken about that, we submit that the feature referred to goes merely to the inadequacy of consideration, and that in the absence of an allegation of fraud and of some proof tending to show fraud, inadequacy of consideration is insufficient to move the discretion of the court to refuse specific performance. Pomeroy on Specific Performance, Sections 193, 194, 195.

In this case, moreover, the inadequacy of the consideration, if in fact there be such, was known and fully considered by appellant when it entered into the contract, and no doubt there were compensating advantages sufficient to justify it, in its own mind, in entering into the contract.

Second. Finality of attorney's opinion as to title.

To whom any opinion was given by the attorneys for appellant on the question of title is not indicated in the argument of appellant. Mr. Post told Mr. West that he had no contract and that if he had a contract it was in conflict with the anti-trust law and likely to get him in jail. We find him, however, co-operating with Mr. West to get the Davenport franchise fixed up. Mr. Avery, Mr. Post's partner, described on the witness stand what he thought were defects in the title, and was mistaken in all his conclusions, but to whom he pointed out those supposed defects as constituting an objection to the title, is nowhere disclosed. The only authoritative communication on the question of title was that made to Mr. West by Mr. G. E. McFarland, President of the Pacific Company, in the following letter:

"December 15th, 1914.

A. T. West, Esq.,

No. 530 Riverside, Spokane, Wash.

Dear Sir:—

We are in receipt of advice from Messrs. Post, Avery & Higgins to the effect that they can not approve the title to that portion of the property of the Davenport Company affected by the bankruptcy proceedings of the Washington Consolidated Company on account of the objections pointed out to you by Mr. Pillsbury at our last meeting. These defects must be cured before the title can be considered good. Further investigation on our part, even in the light of the suggestions contained in yours of the 6th inst., confirms the opinion expressed to you in Spokane, that there is no way in which the Pacific Company can lawfully acquire any portion of the prop-

erty of the Davenport-Company. Our legal department has been over the entire matter and absolutely refuses to sanction the acquisition by this Company of any property unless its right to acquire it is clear.

“Realizing, however, that you have gone to some expense in this matter, I suggest that you submit to us a statement of the expenses you have incurred, and I will then advise you what the company will do toward reimbursing you.

Yours very truly,

G. E. McFARLAND, President.”

Plaintiff's Exhibit 14.

This letter must be taken as fixing whatever objections the appellant had to carrying out its contract with the appellee. On well known principles of estoppel it cannot now urge any others. We find from this letter that no objection whatever was made to the title to property acquired through the foreclosure proceedings, and that as to the title to that portion acquired through the bankruptcy proceeding, the defects were not held up as vital and in themselves defeating the contract, but as something capable of being cured. “These defects,” said Mr. McFarland, “must be cured before the title can be considered good.” There was, then, no rejection by appellant of the title on the ground that it was not a good marketable title, and Mr. McFarland, assuming that the supposed defects in the bankruptcy title could be cured, declined to proceed with the transaction on the sole ground that his company could not lawfully acquire any portion of the property of the Davenport Com-

pany. Thereupon this suit for specific performance was brought.

This disposes of the very elaborate argument submitted by appellant on the question of the finality of the opinion of its attorneys as to title. The appellant is estopped to urge any objection to title other than those contained in the letter of its Mr. McFarland to Mr. West, and as we have seen, that was a practical admission of the sufficiency of title. "Where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such right, remedies or objections to the prejudice of the one misled."

16 Cyc. p. 805, and authorities cited.

Moot vs. Business Men's Inv. Association, 157 N. Y., 201; 52 N. E. 1.

Now on the question of the effect of the attorneys' action in rejecting title, if they ever did that, it appears conclusively that there was in fact no defect of title. Both the bankruptcy proceeding and the foreclosure suit, and the sales under them, are invulnerable to attack, and conveyed not only the physical properties but also the franchises purported to be sold. The objections of Mr. Avery to the bankruptcy proceeding were fanciful so far as they proceeded on any legal ground and capricious in so far as they assumed any impropriety on the part of the Trustee which might

render an assault on the proceeding tenable. The same is true of his objection to the foreclosure proceedings.

In view of these facts, to permit an objection of the attorneys to the title to prevail, in face of the necessary finding of the court that there was in fact a sufficient title, would be equivalent to holding that plaintiff and defendant made a contract which the defendant might avoid at its mere will and pleasure. The attorneys were not disinterested attorneys to whom the title was submitted as arbitrators. They were the attorneys of the defendant. Moreover the testimony shows that they had lent themselves to the defendant to avoid the transaction, and were astute in finding and urging objections. They told Mr. West that the letters constituted no contract; that there was no consideration, and that the contract was clearly violative of the Sherman Anti-trust law, so much so that he was liable to get in jail as the result of the transaction. Plaintiff insists that it is not the law that such a contract as that shown in this case renders the rights of the plaintiff subject to the mere *ipsi dixit* of the defendant or its attorneys. There are some few cases that may be found which hold that doctrine, but most of the cases cited in its support will be found to proceed on peculiarities in the language of the contract which evidence the purpose of both parties to constitute an umpire or arbitrator to pass on the title, or are so explicit in their intent to make the sale dependent on the mere discretion of the vendee or his attorneys, that the courts felt compelled to give effect to that intent.

But where the stipulation is that the title shall be acceptable to the vendee or his attorneys, the better view and that supported by the weight of authority is that it is satisfied by the tender of a good marketable title. We cite in support of that proposition:

- Dean vs. Williams*, 56 Wash. 614.
Wright vs. Suydam, 72 Wash. 597.
Folliard vs. Wallace, 2 Johns, 395, per ch. Kent.
Brooklyn vs. City R. R. Co., 47 N. Y. 475.
Vough vs. Williams, 120 N. Y. 255; 24 N. E. 195.
Duplex Safety Boiler Co. vs. Garden et al, 101 N. Y. 389.
Weisell vs. Mutual Life Ins. Co., 76 N. Y. 119.
Stockton Railroad Co. vs. Stockton, 51 Cal. 338.
Roberts vs. Kimmons, 65 Miss. 332.
McNeill vs. Armstrong, 81 Fed. 945.
Jay vs. Wilson, 36 N. Y. Suppl. 186.
Boyd vs. Hollowell, 62 N. W. 125.
Oakey vs. Cook (N. Y.), 7 Atl. 495.
Beardsley vs. Underhill, 37 N. J. L. 309.

The case of *Church vs. Shanklin*, 95 Cal. 627, which is apparently to the contrary of the above cases, proceeds on the theory that the attorneys in that case were really constituted arbitrators between the parties to pass on the title.

The latter case of *Allen vs. Pockwitz*, 103 Cal. 85, cited by appellant, proceeded on an option to be exercised "if title examined and accepted by the vendees' attorney," the court saying, "it is not claimed that the written agreement was for an unconditional sale." The several cases cited by appellant from Texas, Missouri, Arkansas and Virginia, will each be found to have its peculiar features, justifying the opinion ar-

rived at. Some of the cases are on options, some expressly term the lawyers selected to pass on title as arbitrators, and in some the agreement is so specific in subjecting the vendor to the whim and caprice of the vendee or his attorneys, that the courts could not well avoid giving effect to it.

If there be a substantial difference between the authorities, then we suggest that until the matter is disposed of in the Supreme Court, the Federal Courts ought in this case, as a matter of comity, to follow the rule laid down by the Supreme Court of Washington.

Third. The Sherman Anti-Trust law.

On the question of the invalidity of this contract because of its supposed conflict with the Sherman Anti-trust law, the appellant seems unwilling to plant itself on any one distinct ground, but unaccountably mixes up the Portland decree with its argument on the effect of the Anti-trust law. We have said as much about the Portland decree as we deem necessary. We knew nothing about it, are not bound by it, and if we were, there is nothing in it which prevents us from making a fair sale of our strictly intrastate telephone property.

Addressing ourselves now to the anti-trust law we say that this contract does not involve interstate commerce. It concerns a plant wholly within the state of Washington. If by contract or license that plant was sometime employed in the transmission of interstate messages, that was a mere incident, and not such as to impress the plant with an interstate character such as to forever tie the hands of the owner in the matter

of its sale and disposition. On all fours with this case is the case of Cincinnati Packet Company vs. Bay, 200 U. S. 179. In that case the sale was held to be valid notwithstanding certain interstate features of the business.

We might rely on that case as a decisive one, but need not do so. On the general construction given the Sherman Anti-trust law, the sale must be upheld.

The later and authoritative exposition of that law is to be found in the recent decisions of the Supreme Court of the United States. These embrace:—

Standard Oil Co. vs. U. S., 221 U. S. 1.

United States vs. American Tobacco Co., 55 L. Ed. (U. S. Sup. Ct.), 663.

United States vs. Union Pacific R. Co., 57 L. Ed. (U. S. Sup. Ct.), 124.

International Harvester Co. vs. State of Missouri, 58 L. Ed. (U. S. Sup. Ct.), 1276.

By this exposition the law has been freed from the hard and fast rule attached to it, or supposed to have been attached to it, by previous decisions, and every given case is now to be determined by the rule of reason; that is to say, keeping in mind the double policy of the law to promote on the one hand freedom of trade and the right of the individual to freely contract about his property and his business, and on the other hand to prevent combinations to materially restrain commerce or to effect monopoly therein, does the act called in question really and in effect and substantially, when looked at in the light of reason, effect

a restraint of interstate commerce, or tend to bring about a monopoly therein?

The original view of the act that anything which in effect restrained or injuriously effected interstate commerce was forbidden by the act, without regard to circumstances or conditions, objects or purposes, thus subjecting the business of the citizen to a procustean bed to which it must conform, was overthrown. On the other hand the statute does more than apply the common law rule concerning contracts in restraint of trade as to what are or are not reasonable. It establishes a policy, founded on modern conceptions of monopoly and wrongful and fraudulent restraints of trade, by which every act influencing interstate commerce is to be measured. The right to freely buy and sell and to conduct one's business as one's interest may dictate, is not restrained, however, where the purpose is honest and promotive of the business, by an incidental, remote or partial, or insignificant effect on interstate commerce. The intent of the parties is not material if the clear and well understood effect of their action is seriously and substantially violative of the statute, but if the effect on interstate commerce is only incidental or remote, or partial, and the action is promotive of the business, and such as is within the ordinary contractual rights of the parties, the intent of the parties is a material factor in determining whether their action comes within the statute. This we believe is a moderate statement of the law on the subject and well within the language of the courts.

The cases cited show the construction now put upon the anti-trust statute, and that this transaction is absolutely free from objection under that statute.

The sale was free from any purpose to circumvent the law. It shows that on its face. Moreover, it was of a plant, which, with the exception of the toll line, covered territory, not covered by lines of the appellant, and there was no taint of monopoly or of injurious restraint. The fact, alleged in the bill and not denied in the answer, that appellant was operating by a mere license revocable at pleasure with another company, which occupied the same local territory as the appellee company, does not alter the status of the matter. When appellant contracted to buy from appellee it must have contemplated terminating its license with the other local company, and it still has that power, thus preserving the status as to competition in that territory. The other local company, however, had no toll line from Davenport to Spokane, while appellee had, and to that extent the sale may be said to have destroyed some competition between appellant and appellee, and if that effect would vitiate the sale of the whole plant, then the contract itself provides in effect that the toll line shall not be included in the sale. But plaintiff insists that within the rule laid down by the Chief Justice in the cases referred to, the toll line may be included in the sale without violating the policy of the law.

More than that, the appellee's interstate business was dependent on a mere contract relation existing

between the predecessor in interest of appellee to which contract appellee never became a party, and certain companies doing a business from Spokane into the State of Idaho. It is sufficient to relieve the sale from embarrassment by reason of that feature to say that the appellee company did not succeed to that contract and never entered into any new contract on its own part, and that the interstate companies refused to recognize the old contract. But suppose the old contract still subsisted, it might be terminated by either party at will (subject, of course, to responsibility for damages) and either party might be relieved of it by bankruptcy, dissolution, or any one of a number of incidents. One such incident has supervened, namely, the purchase by the appellant of both of the companies with which the contract relation is said to have existed. True it is that defendant has since been compelled to sell its control of the Interstate Company, but the competition that might have existed between appellant and appellee in interstate commerce had been destroyed by appellant's own act at the time it made its contract of purchase with appellee.

But over and above all this, can it be held in reason that the owners of an intrastate plant is deprived of the power to sell its plant to a purchaser engaged in interstate business, simply because of a contract with some third person or corporation under which in certain partial and insignificant particulars, it permitted its plant to be employed in interstate business? That the Sherman Anti-trust law ever contemplated any

such result seems to us a proposition too absurd for acceptance.

Proceeding now from the general to the particular, we say that to the extent that the lines of the appellee did an interstate business, it was a mere incident of the main business too small and insignificant to be taken into account. That feature of the case could be disposed of and ought to be disposed of on the maxim, *de minimus non curat lex*. According to Mr. West's testimony the interstate business of his company for twenty-two months prior to the contract of sale averaged forty-two cents a month outgoing and seventy cents incoming, or a total of one hundred and twelve cents a month, or \$13.44 per year. (Record p. 75).

That the appellant was purchasing these lines and the appellee selling, with the intention of circumventing the Anti-trust law and creating a monopoly in interstate telephone communication, is a proposition to excite the amused contempt of any one except a dishonest suitor striving to break the meshes of the law that bind him to live up to his honorable obligations.

Even in cases where the amount of interstate business is sufficient to make it of some moment, the question is not settled by that criterion alone. As was said in *Anderson vs. United States*, 171 U. S. 616, the transaction is not illegal "where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but

indirect and incidental and not the purpose or object." Where the amount of the interstate business done is negligible, the Supreme Court of the United States has indicated that that fact alone would show the transaction to be innocuous to the law.

In *United States vs. Union Pacific Railway*, 226 U. S. 61, 88, the court employed this language:

"It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete, and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock, this traffic was the subject of active competition between these systems; but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected."

This is the case cited by appellant against the validity of the contract of sale in this case. We submit that appellant has misconceived it. It overruled the lower court because that court had measured the transaction, not by the amount of competitive business done, but by the relative proportion of that business to the non-competitive business. That criterion the court said was not the correct one. The correct one

was the amount of competitive business actually done, and if that was considerable it made no difference what proportion it bore to the other business. As the court said of the interstate business affected by the combination shown in that case, "It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected."

We also cite as authorities showing the validity of the transaction here in question:

Darius Cole Transp. Line vs. White Star Line,
186 Fed. 65.

U. S. vs. Whiting; 212 Fed. 473.

Fourth. Mr. West not authorized to make a contract.

The last proposition urged by the appellant is that Mr. West was not authorized by unanimous vote of all the stockholders to sell the property of the Davenport Independent Telephone Company and therefore that his letter to Mr. McFarland accepting the offer of the latter for the purchase of the property was without authority and void, and failed to create any contract.

Volume 3, section 670, of Cook on Corporation, is cited to the proposition that a corporation cannot sell all its property except by unanimous vote of all its stockholders. A recurrence to the text of that work, however, does not bear out the proposition. The language of Cook is that "a dissenting stockholder may prevent the sale of all the corporate property by the

directors or by a majority of the stockholders.” Since the appellant is not a dissenting stockholder it does not appear to lie in its mouth to question the authority of the contract of sale, and since the appellee is in court insisting on the sale, and it does not appear that there is any stockholder objecting, a decree affirming the sale and requiring specific performance, would undoubtedly bind the appellee and all its stockholders and amply protect the appellant. The action of the appellee in this suit is the action of all its stockholders, and binds them as effectually as if they were all in court. We believe an examination of the adjudged cases will fail to show a single authority holding that a purchaser of corporate property may question the authority of the corporation to sell where the corporation, without dissent from any of its stockholders, is in court insisting on the sale.

But it is not true that there was not unanimous assent of the stockholders to the contract of sale. At a meeting held June 30, 1914, the following proceedings were had:

“The chair submitted an offer in writing under date of May 20th, 1914, from President McFarland on behalf of the Pacific Telephone and Telegraph Company to purchase the property of this company or such portion of it as it could lawfully acquire, paying therefor the appraised value of the plant as determined by the reproduction cost new, provided the acceptance of the offer be filed with them on or before sixty days from the date thereof; Mr. Armin offered the following and moved its adoption. Resolved that the offer by President McFarland on behalf of the Pacific

Telephone and Telegraph Company be accepted and the President is hereby directed to make formal acceptance of the same prior to the expiration of the sixty day limit, and also arrange for the appraisal in accordance with the conditions set forth in the offer. Resolution adopted by the following vote: Ayes, Armine, Cornell, West; Nays, none."

Record pp. 44 and 45.

Mr. West testified with respect to this meeting: "The gentlemen named in the resolution are the Trustees. There are two others, Mrs. West and Mrs. Armine. They were seldom present. The members of the Board of Trustees own all the stock. Mr. Armine has Mrs. Armine's proxy, I have Mrs. West's." Record, p. 45.

The attorney for appellant undertook in cross examination to cast doubt on the actual holding of this meeting but without success. While it is true that the minutes of the company show that the meeting in question was a meeting of the Trustees, the three Trustees, with the wives of two of them, constituted all the stockholders of the company, and with all the stockholders thus assenting in their capacity as Trustees, no formal meeting of the stockholders was necessary. In small business corporations, where the stockholders are few and can consult together much as business partners, their assent may be gathered to any proposed course of action without formal meetings, and in such

cases any method of proof that shows the assent of all the stockholders shows the assent of the corporation.

Pacific State Bank vs. Coats, 205 Federal Reporter, 620.

Respectfully submitted,

TURNER & GERAGHTY,
Attorneys for Appellant.

IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a Cor-
poration,

Appellant,

vs.

No. **2693**

DAVENPORT INDEPENDENT
TELEPHONE COMPANY,

Appellee.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

Reply Brief of Appellant

POST, AVERY & HIGGINS,

Attorneys for Appellant.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

MAR 15 1916

F. D. Manick

IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a Cor-
poration,

Appellant,

vs.

DAVENPORT INDEPENDENT
TELEPHONE COMPANY,

Appellee.

No.....

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

Reply Brief of Appellant

POST, AVERY & HIGGINS,
Attorneys for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

The argument contained on page 10 of appellee's brief is a most forceful one in favor of our contention that the expression in the so-called contract, "the title to such property to be acceptable to the attorneys for this company," is not mere persiflage and was not so intended by the parties and can not be ignored by the courts. Appellee's argument is also persuasive in support of our further contention that it was the intent of the parties that the attorneys should determine what, if any, property the "company may lawfully acquire."

On page 34 of appellee's brief are cited numerous authorities asserted to be in support of its contention that the stipulation in the contract that the title must be acceptable to the attorneys for the company is met if a marketable title is tendered; and it is suggested that that rule has been laid down by the Supreme Court of Washington.

The case of *Dean v. Williams*, 56 Wash., 614, cited by appellee, is a case where the contract provided that the title should be acceptable to the *purchaser* and not to the attorney, and the fact that a different rule prevails under such a contract is settled by the authorities as stated in 39 Cyc., 1509 and 1510, cited in our opening brief at page 27.

The second Washington case cited, *Wright v. Suydam*, 72 Wash., 597, is not in point, as that is an action brought by the *vendee* against the vendor. This

question was not there involved. The other cases cited, with the exception of one, do not relate to the point at all, but are cases involving enforcibility of contracts providing for engineers' estimates, architects' certificates, and the like. The case involving an attorney's opinion, *Boyd v. Hollowell*, does not support appellee's contention.

While the question does not seem to us to be material, the fact is that the Supreme Court of Washington has repeatedly strictly enforced the provisions in building contracts providing for architects' certificates and engineers' estimates.

See *Brown v. Winehill*, 3 Wash., 524;
Schmidt v. North Yakima, 12 Wash., 121;
DeMattos v. Jordan, 20 Wash., 315;
Dickerman v. Reeder, 59 Wash., 405.

On page 15 of appellee's brief the point is made that if there is a valid judgment and a valid execution, failure to comply with the statute as to giving notice of sale does not affect the title of the purchaser at such sale although no notice was given. Citing three California cases: *Smith v. Randall*; *Flood v. Light*, and *Frink v. Roe*. Whether that is or is not the present California rule, we are not advised, but if so, it is contrary to all other authority as is expressly pointed out in 17 Cyc. p. 1276, Note 68, the text being:

“In almost every jurisdiction, failure by the officer to give the proper notice of sale is sufficient ground for setting it aside where the motion is made by an interested party in due season.”

The case of Boles v. Johnson, and following cases cited on page 15 of appellee's brief, do not hold as stated therein, but do hold that the remedy is not by action to recover possession of the property, but by motion made in the court where the judgment was rendered to set aside the sale. That question is clearly beside the issue, because, if the provision about the satisfaction of attorneys were nugatory, the purchaser must be tendered a title which is not subject to attack *by any one in any manner*. The authorities are cited in our opening brief.

The next point urged at the bottom of page 15 of appellee's brief is that the judgment debtor cannot move against the sale after the time for redemption has expired. The authorities cited at the top of page 16 of appellee's brief do not sustain the contention. In the Illinois case, twenty years had elapsed after the date of sale and the court held laches and acquiescence. In the Oregon case there had been an order of confirmation of sale and we believe that the rule is well settled that an order of confirmation cures irregularities not jurisdictional. In the case at bar there was no order of confirmation.

In the case at bar the judgment debtor was the purchaser at the foreclosure sale. Under the settled law of the state of Washington, it and its subsequent grantee (this appellee) are chargeable with notice of all irregularities in the judgment, execution and sale. This was decided in *Hacker v. White*, 22 Wash., 415, cited by this court in *London & San Francisco Bank v. Dexter, Horton & Co.*, 126 Fed., 593.

That the purchaser from the judgment creditor, who was purchaser at the sale, stands in no different position than the judgment creditor, was expressly decided in *Woodhurst v. Cramer*, 29 Wash., at page 48. See also *Lee v. Wrixon*, 37 Wash., 47.

That the purchaser from the judgment creditor stands in no better position than the judgment creditor, is stated in the text of 17 Cyc., pages 1304-5-6.

On pages 13 and 14 of brief, appellee suggests that the findings in the foreclosure suit are no part of the judgment roll and did not find that Reynolds was the owner of the property, and that they "unfortunately are not printed with the record and appellee cannot in their absence quote from them on this point as it would like to do." Inasmuch as this foreclosure suit was brought in the Superior Court for Spokane county and the papers are on file in the Clerk's office in the City of Spokane, where counsel for appellee reside and have their office, it would be quite possible for them to quote from the findings if they desired so to do. As a matter of fact the findings are as stated in our opening brief, the same being Exhibit No. 7. That the findings in an equity case are not an unimportant part of the record in that case, is shown by the statute. Section 367, Vol. I., Remington & Ballinger's Annotated Codes & Statutes, being Sec. 5029 of Ballinger's Code, is as follows:

"Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be

separately stated. Judgment upon the decision shall be entered accordingly.”

Sections 383 and 387 of the same code, being Sections 5052 and 5056 of Ballinger’s Code, provide that if the defeated party shall desire to appeal to the Supreme Court, exceptions must be taken to the findings of the trial court.

On page 12 appellee suggests that the mortgage attempted to be foreclosed was for \$200,000. While perhaps not material, it is certainly proper that statements of fact be reasonably correct. Finding No. 8, (Exhibit No. 7) is that the bonds actually certified under this trust deed aggregated only \$39,700, and Findings of Fact numbered 15, 16, 17 relate to how these bonds were issued, and Conclusions of Law No. 2 is to the effect that the total amount to be recovered on these bonds under this decree is \$14,142.55 plus interest from December 1, 1910. So the matter of redemption is not such an herculean task as would be imagined from appellee’s statement. The fact that the accepted bid at the foreclosure sale was only \$1500, the amount of the attorney’s fees, and that the bondholders actually got nothing and would therefore naturally undertake to set aside such sale, is a matter that would naturally challenge the attention of an examiner of title, as pointed out in our opening brief.

The statement on page 27 of appellee’s brief, that Mr. West had no particular knowledge of the Portland decree, is contradicted by Mr. West himself. (Transcript, page 81).

A remarkable argument not made in the court below or suggested in the trial judge's opinion is contained on pages 30 to 32, appellee's brief. This relates to the finality of attorney's opinion as to title. It is suggested that Mr. MacFarland's letter shows, first, that the only objection to title related to the bankruptcy proceeding; second, that that was not treated as final; and third, that the defendant is estopped to raise any other objection. The letter, on the other hand, clearly shows that the company declined to take the property because the attorneys had decided that (a) the title is defective and (b) that the company cannot lawfully acquire any part of this property. The testimony of Mr. Avery and Mr. West show beyond question that Mr. West was in frequent consultation with Mr. Avery in respect to the title, and also on one occasion with Mr. Post, and that he was advised that the title was defective not only as to bankruptcy proceedings, but also as to foreclosure proceedings. This letter, quoted on pages 30 and 31 of appellee's brief, also shows that the appellant suggested that Mr. West submit a statement of any expenses he may have incurred, if he had incurred any, subsequent to the writing of the letter set out in the complaint, with a view of having appellant reimburse him therefor, purely as a matter of equity. It further appears undisputed that the appellee's plant was physically connected with the consolidated exchange in Spokane, as set forth in the original letter, and through that exchange with the long distance lines running into Idaho and elsewhere, and that through

that connection the appellee was materially benefited. The authority cited in appellee's brief on page 32 itself demonstrates that there is no point to the argument, because it is not contended that any expense or any action was taken by the appellee on the strength of the letter of December 15, 1914. The only thing done was the commencement of this action about one month later.

The suggestion on page 39 of brief that the Bell interests had been compelled to sell the control of the Interstate Company *since* the making of the so-called contract set out in the complaint, is misleading. The final decree in the government suit requiring such sale was entered *before* this so-called contract, Exhibit No. 20, and Mr. West knew all about it. (Trans., p. 81).

The suggestion that a court of equity could enter a money judgment herein even though the appellant could not lawfully acquire any of the property, is most astounding. All authority is to the contrary. We have contended that the so-called contract could not reasonably be thus construed. Appellee contends to the contrary. This alone shows the correctness of our discussion that a decree of specific performance will never be granted unless the terms of the contract "are fair and so definite and certain that they cannot be reasonably misunderstood." (Opening brief, pages 18 to 22).

If appellee's contention were true, what would be the reason or consideration for appellant paying ap-

pellee this large sum of money? The consideration manifestly would not be a legal or lawful one, and if the appellee were correct in this argument as to the meaning of the contract, then the case would manifestly fall also under the principle of *ex turpi contractu non oritur actio* argued in our opening brief beginning at page 38. We believe all other matters are fully covered in our opening brief.

Respectfully submitted,

POST, AVERY & HIGGINS,

Attorneys for Appellant,

PILLSBURY, MADISON & SUTRO,

Of Counsel.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a cor- poration,	}	No. 2693
<i>Appellant,</i>		
vs.		
DAVENPORT INDEPENDENT TELEPHONE COMPANY,	}	
<i>Appellee.</i>		

Upon appeal from the United States District
Court for the Eastern District of Washington,
Northern Division.

MOTION FOR REHEARING.

TURNER & GERAGHTY,
Attorneys for Appellee.

McKee Printing Co., Spokane, Wash.

Filed

NOV 28 1916

F. D. Monckton,
Clerk.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,	<i>Appellant,</i>	}	No. 2693
<i>vs.</i>			
DAVENPORT INDEPENDENT TELEPHONE COMPANY,	<i>Appellee.</i>		

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

MOTION FOR REHEARING.

Comes now the Appellee and petitions the Court for a re-hearing in the above entitled cause and bases its petition on the following grounds:

First. This case was not argued orally, and it is evident that appellee's position has been misunder-

stood by the court and that undue effect has been given appellee's discussion of the question of certainty in the contract, in the determination by the court of another and entirely different question. The opinion declares:

"According to the express admissions made in the brief of the learned counsel for the appellee, the determination of the question as to whether the appellant could lawfully acquire any of the property was by the contract, vested solely in the appellant."

We can see how the court, considering the case without the aid of oral argument, could be led into the erroneous view above indicated, but that it was most grievously erroneous we shall now proceed to demonstrate.

In the first place, neither in the court below nor in this court, was there any predicate in the pleadings for the contention that discretion was vested in the appellant to reject the contract on the ground that it could not lawfully acquire the property. The answer, paragraph two, p. 21 Record, sets up affirmatively the defense that the title to the properties was not acceptable to appellant's attorneys and that appellant had so advised the appellee, but not the defense that the attorneys had any discretion to determine that appellant could not lawfully acquire the properties. The succeeding paragraphs, three, four, five and six, set up the nature of appellant's business, and the nature and character of the property and business of appellee, and also a history of appellant's litigation with the govern-

ment in the District Court of Oregon, and concluded in paragraph six: "And this defendant further alleges that the sale of the property referred to in said paper writing, or any part thereof, by the plaintiff to the defendant, would be in violation of the anti-trust laws of the United States, and especially of that certain act of Congress entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' being the Act of July 2, 1890, commonly known as the Sherman anti-trust act, in that the same would be in restraint of trade or commerce in telephonic communication between the state of Washington and the state of Idaho, and would tend to monopolize such commerce, and would also be in violation of the decree in the suit brought by the United States government against this defendant and others hereinbefore referred to and the said paper writing is void and unenforceable under the provisions of said statute."

It will be seen that the validity of the contract was thus put in issue but no where was there a suggestion that the contract provided or intended that the appellee should be at the mercy of the appellant in the determination of the question of the validity of the contract. The case was tried in the lower court without any such suggestion written or oral. No such suggestion was noticed in the opinion of the trial judge.

In the assignment of errors in this court no suggestion was made that the court below erred in not giving effect to the determination by appellant of its

want of power to purchase the properties. The fourth assignment takes the position that the court erred in not giving effect to the rejection of title by appellant's attorneys, but that is all.

Now while it is true that the brief of the appellant, p. 41, declared it to be the "clear intent of this letter (the letter by McFarland offering to purchase) that the legal questions involved should be passed upon by the attorneys for the appellant and that this 'gentleman's agreement' should not be brought into court * * * but that the question as to what they might lawfully acquire was to be left to and determined by the attorneys for the appellant after they had had sufficient opportunity to investigate the matter," the proposition was so destitute of reason or logic to support it, and so much in the air in the matter of averment in the pleadings on which to plant it either in this court or in the court below, that appellee did not conceive it necessary to dwell on the matter at any length. It required only a reading of McFarland's letter to show that no such right as claimed had been reserved to the appellant. Moreover, if any such right had been attempted to be reserved, there is no authority for extending the doctrine concerning the effect of an attorney's determination of title, to the determination of other questions clearly belonging to the courts, such as the validity or invalidity of contracts.

We now come to the supposed admissions in appellee's brief to the effect that "the determination of the

question whether the appellant could lawfully acquire any of the property, was by the contract vested solely in the appellant."

The supposed admissions are found in a discussion of the question, "was the contract sufficiently certain to warrant specific performance?" In the discussion of that question, the brief pointed out, p. 8 and 9, that all the lines of appellee were innocuous to objection because not competing with any line or lines of appellant except a toll line forty miles long extending from Davenport to Spokane, and then continued: "To the extent that the latter line did an interstate business, the appellant, if it was honest in its offer of purchase and ever intended to carry it out, may have thought that that particular part of appellant's line was an interstate competitor with it, and that it had no right to purchase that particular part of appellant's lines. Hence the offer of the reproduction value of the entire system for such portion thereof as appellant might lawfully acquire." The statements quoted from appellee's brief by the court are to be construed in the light of the fact thus pointed out. Counsel was not considering the right of appellant to decline to take *any* of the property. He was considering its right to take the whole or only a part, as it might determine. And he was considering that, not as measuring any substantive right of the appellant but as fixing the certainty of the contract for the purposes of specific performance. We beg the court to read again the extracts from appellee's brief quoted by it, in the light of this explanation, and

find if it can the admission that the right was vested in the appellant to determine whether it could lawfully acquire *any* of the property. Is it to be found in the declaration, "it could take all the properties if it thought such a purchase innocuous to the law. If it doubted its right to purchase all, it could take any part that it conceived it had a right to take." Is that a declaration that appellant might refuse to take *any* of the properties? "The contract stood for all or a part as the appellant might determine." Is that a declaration that the contract stood for all or *none* as the appellant might determine?

The meaning of the discussion in the brief is very clearly shown, it seems to appellee, by what was said about the course open to the court in the trial of the case. "It could have required the appellant to elect whether it would take *all or only part of the property.*" "It could go on and determine for itself whether appellant might lawfully acquire *all* or only a *portion*, of the property." Nowhere in any part of the brief quoted by the court, or in any other part of the brief, we respectfully insist, is there an admission or declaration or the slightest hint or intimation, that the appellant had a right to determine for itself that it could not lawfully acquire *any* of the property. That it might lawfully acquire some of the property, and that it was obligated to take some, although it might not be permitted by the law to take all, was the predicate upon which the entire argument of appellee proceeded.

Besides all this, the express declarations of the brief negatived any such import as that given the brief by this court. On p. 4, it was said: "It was not a matter to be determined by the preconceived view of attorneys on either side, as suggested by appellant, because the legal rights of suitors are not foreclosed in that manner."

On p. 28 and 29, we said: "The most amazing position of all advanced by appellant in this connection is that 'it was the clear intent of this letter (the offer of purchase) that the legal questions involved should be passed on by the attorneys for the appellant,' and that the 'gentlemen's agreement' should not be brought into court.' Inasmuch as no attempt is made to support the proposition by reason or authority we will take up no time in discussing it," etc.

We conceive that it is unnecessary to say more to convince the court that it has seriously misapprehended the position of the appellee on this branch of the case.

Second. On the subject of the rejection of title by the attorneys, we beg most respectfully to insist that the court was in error in saying that the evidence failed to show "any bad faith, or arbitrary or capricious action in that regard but that the rejection of the title by the attorneys for the appellant was based upon defects which were clearly debatable, and, at least, not free from doubt."

The record shows that Mr. West, the President of

the appellee, supposing that appellant was acting in good faith, consulted with and relied upon the attorneys of the appellant up to the time of Mr. McFarland's letter of December 15th, 1914, declining to carry out the contract (Plaintiff's exhibit 14), and that he and they acted together in the effort to clear up a number of minor defects in the title suggested by the attorneys. But that the attorneys ever pointed out any but minor and curable defect to him is nowhere shown. It is true that Mr. Avery in his testimony, pp. 94 to 101, pointed out what he considered defects in the foreclosure proceeding as well as those in the bankruptcy proceeding, but his testimony went to the question of marketable title in fact, an issue before the court, and not to any defects in title pointed out by him or his firm to the appellee.

Mr. McFarland's letter is the only communication oral or written ever received by the appellee, pointing out any reason why the appellant declined to go on with the contract. The record is short and the court can verify this statement without much labor.

Now, looking at Mr. McFarland's letter (Record pp. 30 and 31), we see that he informed Mr. West that the company had been advised by Messrs. Post, Avery & Higgins that they could "not approve the title to that portion of the property of the Davenport Company affected by the bankruptcy proceedings of the Washington Consolidated Company," etc. No other objection to the title was suggested. The objection then on

the score of title was confined to the bankruptcy proceedings, and while Mr. McFarland's letter fails to show what the objections were, Mr. Avery described them in his testimony. (Record pp. 98 and 99.) He said: "My objection to the bankruptcy proceeding was I thought that the stipulation of the petitioning creditors and the alleged bankrupt, that the proceedings might be dismissed, prevented any further action by the court." The stipulation of dismissal referred to was after the adjudication of bankruptcy, and, therefore, at a time when the rights of all the world had attached. We feel that the court must have overlooked that fact when it stated in its opinion that the action of appellant's attorneys "was based upon defects which were clearly debatable, and at least, not free from doubt," or if that be not true, that it was misled by the clamor of appellant's brief, wholly without order or system, and therefore liable to mislead, into the belief that other objections to the title than those arising out of the bankruptcy proceeding had been urged or raised. Mr. Avery made one other criticism of the bankruptcy proceeding, namely, that the property of the bankrupt had not been sufficiently described, but his criticism hardly amounted to an objection. He said: "I would not like to say I thought the general description of the property would render void an order of the Referee in Bankruptcy made at a later period ordering the sale of all the property, but I thought it rather defective." (Record pp. 98 and 99.)

We accept for the purposes of this petition the law as laid down in the opinion of the court, namely, that the action of appellant's attorneys in rejecting the title was conclusive in this case, unless that action was in bad faith or arbitrary or capricious. We assume, however, if the defects held up by the attorneys were clearly so frivolous as to be not debatable, and that their invalidity was absolutely free from doubt to the apprehension of any fairly well informed member of the bar, that then the court ought to have no difficulty in finding that the objections if not made in bad faith, were at least arbitrary and capricious. We cannot conceive any well informed lawyer advising a client that a stipulation for dismissal of bankruptcy proceedings, between a bankrupt and certain of his creditors, made after an adjudication of bankruptcy, could have any effect in preventing the case proceeding to an orderly conclusion.

The conclusion to be drawn from the patent invalidity of the objection taken by the attorneys, is fortified by other features of this case. There is no doubt that the attorneys for appellant lent themselves to their client in the effort to rid it of a bad bargain. At a time when Mr. West had no attorney of his own, and was relying on the friendly advice of appellant's attorneys, they told him the letters between him and McFarland constituted no contract on the general principles of law; that if they constituted a contract it was without consideration, and, moreover that it was contrary to the anti-trust laws of

the United States and was likely to land him in jail. (Testimony of A. T. West, record p. 76.) We submit that these statements were so untenable from a legal standpoint, at least those relating to the want of consideration, and to the effect of letters such as had passed between the parties, that no legal firm of the standing of Post, Avery & Higgins can be thought to have believed them. If that be true, then their action with respect to title must be rejected from start to finish. They were simply aiding their client to avoid a contract it did not wish to carry out, and were acting to that end arbitrarily, capriciously and in bad faith.

Third. The court did not notice in its opinion a point made in the brief of appellee which we think worthy of serious consideration, namely, that appellant never, as matter of fact, made any objection to title, but predicated its refusal to proceed on its want of power to purchase the property under the provisions of the Sherman anti-trust law. The letter of Mr. McFarland, after setting out the advice of Post, Avery & Higgins, with respect to supposed defects in the bankruptcy proceeding, continued: "These defects must be cured before the title can be considered good. Further investigation on our part, even in the light of the suggestions contained in yours of the 6th inst., confirms the opinion expressed to you in Spokane, that there is no way in which the Pacific Company can lawfully acquire any portion of the property of the Davenport Company. Our legal department has been over the

entire matter and absolutely refuses to sanction the acquisition by this company of any property unless its right to acquire it is clear." It is impossible to give this letter an interpretation which makes it stand on any defect or defects in the matter of title. On the contrary, it refers to the supposed defects in title as something capable of being cured. But it says, we can't proceed without violating the anti-trust laws of the United States, and we refuse to go further for that reason. After this letter there was no incentive for Mr. West to endeavor to cure the supposed defects in the title. The appellant was refusing to proceed on another ground. Its letter said in effect, "our attorneys have brought to our attention defects in the title. They are, however, defects that can be cured. But there is another objection which cannot be cured. We can't consummate the purchase without violating the laws of the United States and we refuse to proceed for that reason." In this posture of the case there was nothing for the appellee to do but to join issue with appellant on the validity of the contract in an action for damages or for specific performance. It did the latter and is now turned out of court on the untenable ground that the attorneys of appellant rejected this title.

Fourth. We cannot but feel that the appellee has been prejudiced in the eyes of this court by the disingenuous attempt of the appellant, pages 38, 39 and 40 of its brief, to create the belief that Mr. West had coerced the appellant by some kind of duress into making the

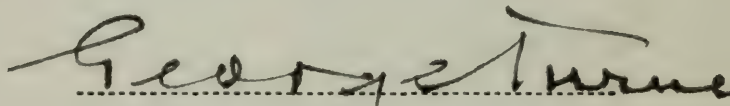
offer to purchase his properties. All that appellant says in that connection is utterly unsupported by the evidence, except the inference attempted to be drawn from the letter of West to Kingsbury in which the former stated that the transaction "was left largely in the nature of a gentlemen's agreement, with your assurance that it would be carried out." Much is made of that expression as indicating some kind of mala fides on the part of West. It merely indicates, however, what the evidence shows, that West, not having then been advised by counsel of his own, and placing confidence in the insidious advice of the attorneys for appellant, believed that the letters passing between McFarland and himself constituted no contract, and that he was endeavoring, notwithstanding that fact, to hold the appellant up to the honorable agreement, "gentlemen's agreement," which they did clearly evidence. The mala fides in this case is all on the part of appellant. It desired to cozen and deceive the City Council of Spokane and with a view of ridding itself of the opposition of West, whose personal interests were involved in resisting its attempts on the public, made its contract with the latter to purchase his properties. Having by that means accomplished its principal purpose it then commenced its inequitable effort to cozen and defeat West. It has nearly accomplished the latter purpose,

and will have done so completely, if this court does not re-open this case and listen to an argument that presents the merits fully and understandingly.

Respectfully submitted,
TURNER & GERAGHTY,
Attorneys for the Appellee.

George Turner, one of the counsel for the appellee in the above entitled cause, hereby certifies that in his opinion the above and foregoing petition for re-hearing is well founded and that the same is not interposed for delay.

Dated at Spokane Washington November 20, 1916.



Of Counsel for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, as Trustee of the Estate of
IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of
SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain
Order of the United States District
Court for the District
of Arizona.

Filed

JAN 20 1916

F. D. Monckton,

clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

In the Matter of the SOUTHERN ARIZONA
SMELTING COMPANY, a Corporation,
Bankrupt.

Petition to Revise in Matter of Law.

To the Honorable, the Judges of the Circuit Court
of Appeals, of the Ninth Circuit of the United
States:

Your petitioner, John H. Martin, Trustee in Bankruptcy of the estate of the Imperial Copper Company, a corporation, bankrupt, respectfully shows:

That he resides at the city of Tucson, Pima County, Arizona, within said district, and is trustee in bankruptcy of the estate of the Imperial Copper Company, a corporation, bankrupt, a creditor of the Southern Arizona Smelting Company, a corporation, bankrupt, which was so adjudicated by the United States District Court for the District of Arizona, on the 29th day of September, A. D. 1914.

That heretofore, on January 23, 1912, M. P. Freeman, trustee in bankruptcy of said Imperial Copper Company, a corporation, bankrupt, and the predecessor of your petitioner, instituted an action in the then District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, against the Southern Arizona Smelting Company, a corporation, to recover from the said smelting company the sum of \$26,887.71, upon an indebtedness then due and owing from the said smelting Company to the said estate the *the* said Imperial

Copper Company, a corporation, bankrupt.

That thereafter, on June 17, 1914, the said M. P. Freeman, as trustee in bankruptcy of said Imperial Copper Company, a corporation, bankrupt, and as the predecessor of your petitioner as such trustee, in obedience to an order issued by this Court, caused to be issued in said action a writ of attachment and caused the same, on the 19th day of June, 1914, to be levied upon all of the property of said smelting company situate in Pinal County, Arizona.

That thereafter, on July 1, 1914, said M. P. Freeman resigned as trustee in bankruptcy of said Imperial Copper Company, a corporation, bankrupt, and your petitioner was elected as such trustee to fill said vacancy, and was also substituted as plaintiff in said attachment proceedings in place of said M. P. Freeman.

That thereafter, and within four months of the levy of said attachment the said Southern Arizona Smelting Company filed in this court its voluntary petition in bankruptcy, and on the same day and without any notice to your petitioner was adjudicated a bankrupt upon said voluntary petition; and that thereafter, and on or about the —— day of ———, 1914, the said M. P. Freeman was elected trustee in bankruptcy of said Smelting Company.

That thereafter and on or about March 18, 1915, the said M. P. Freeman, as trustee in bankruptcy of said Smelting Company filed herein his certain petition; alleging among other things that at the time of the levy of said attachment the said Southern Arizona Smelting Company was insolvent, and praying

that an order be issued herein to show cause why your petitioner as trustee in bankruptcy of the said Imperial Copper Company, a corporation, bankrupt, should not be enjoined and restrained from further prosecuting said action in said State Court.

That on the said 18th day of March, 1915, the said District Court made an order directing your petitioner, as trustee of said Imperial Copper Company, a corporation, bankrupt, to appear upon the 3d day of April, 1915, at ten o'clock A. M., and show cause why said injunction should not be issued.

That thereafter and on or about March 31, 1915, your petitioner, as trustee in bankruptcy of said Imperial Copper Company, a corporation, bankrupt, filed herein his answer to said petition and order to show cause, and, among other things, denied that at the time of the levy of said writ of attachment or at the time of the filing of said voluntary petition in bankruptcy by the said smelting company and the said adjudication therein, or at any time, said smelting company was insolvent and alleged that at all of said times the said smelting company was solvent and that the aggregate of the property of said smelting company, exclusive of any property which it might have transferred, concealed or removed or attempted to conceal or remove with intent to defraud, hinder or delay its creditors, was and is, at a fair valuation thereof, sufficient in amount to pay its debts, and prayed for an order that the Court proceed to hear said matter and take evidence with reference to the question of the insolvency of said smelting company.

That thereafter said matter came on for hearing and, after argument by respective counsel, the same was submitted to the said District Court for its decision and judgment.

That thereafter, and on or about the 2d day of November, 1915, said District Court rendered its decision and directed that an order be entered granting the injunction prayed for by said M. P. Freeman, as trustee in bankruptcy of said smelting company, and staying the attachment proceedings in the said suit of John H. Martin as trustee in bankruptcy of the Imperial Copper Company, a corporation, bankrupt, against the Southern Arizona Smelting Company, a corporation, as above referred to.

That the said order was erroneous in matter of law in that:

1. The Court erred in holding in effect that the adjudication of bankruptcy of said smelting company upon the voluntary petition filed by it within four months of the levy of said writ of attachment dissolved or voided the attachment lien irrespective of whether or not said smelting company was solvent or insolvent at the time of the levy of said attachment or at the time of said adjudication made upon such voluntary petition.

2. The Court erred in holding that the adjudication of bankruptcy of the smelting company upon its voluntary petition was binding and conclusive upon petitioner, a creditor of said smelting company, and *res adjudicata* of petitioner's right to test the question of solvency or insolvency of the smelting company.

3. The Court erred in holding that petitioner was precluded, by reason of the adjudication so made in such voluntary petition, from contesting the question of solvency or insolvency of the smelting company.

4. The Court erred in holding that the question at issue was one of law and not one of fact to be determined upon evidence, to wit, whether or not at the time of the levy of the attachment or at the time of the adjudication the said smelting company was solvent or insolvent.

5. The Court erred in holding in effect that although the smelting company may have been solvent at the time of the levy of the attachment or at the time of the adjudication, that the attachment lien of petitioner was nevertheless dissolved.

6. The Court erred in denying to petitioner, a creditor of said smelting company, the right to test the question as to the solvency or insolvency of said smelting company at the time of the levy of said writ of attachment or at the time of such adjudication.

That certified copies of all that portion of the record pertaining to the proceedings and questions involved herein are on file herein, having been sent up to this Court by the clerk of the United States District Court for the District of Arizona, annexed to the petition for review of said matter heretofore filed by petitioner in said District Court.

WHEREFORE, your petitioner, feeling aggrieved because of such order, asks that the same may be reviewed in matter of law by your Honorable Court, as provided in Sec. 24-b of the bankruptcy

law of 1898, and the rules and practice in such case provided.

JOHN H. MARTIN, ..
Trustee in Bankruptcy of the Imperial Copper Com-
pany, a Corporation, Bankrupt, Petitioner.
FRANCIS M. HARTMAN,
E. F. JONES,
Attorneys for Petitioner.

State of Arizona,
County of Pima,—ss.

I, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information, and belief.

JOHN H. MARTIN,

Subscribed and sworn to before me this 1st day of December, A. D. 1915.

My commission expires Feb. 19, 1916.

[Seal] R. W. LANGWORTHY,
Notary Public, Pima County, Arizona.

[Endorsed]: No. 2697. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. John H. Martin, as Trustee of the Estate of Imperial Copper Company, a Corporation, Bankrupt, Petitioner, vs. M. P. Freeman, as Trustee of the Estate of Southern Arizona

Smelting Company, a Corporation, Bankrupt, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Arizona.

Filed December 6, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, as Trustee of the Estate of
IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of
SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Respondent.

**TRANSCRIPT OF RECORD IN SUPPORT OF
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain
Order of the United States District
Court for the District
of Arizona.

[Names and Addresses of Counsel.]

F. M. HARTMAN, Esquire, Tucson, Arizona.

EDWIN F. JONES, Esquire, Tucson, Arizona.

SELIM M. FRANKLIN, Esquire, Tucson, Arizona.

ELLINWOOD & ROSS, Bisbee, Arizona.

[1a*]

[Petition for Injunction to Stay Suit in State Court.]

*In the District Court of the United States, for the
District of Arizona.*

In the Matter of the SOUTHERN ARIZONA
SMELTING COMPANY, a Corporation,
Bankrupt.

Your petitioner, M. P. Freeman, respectfully
shows:

I.

That Southern Arizona Smelting Company, a corporation, was duly adjudicated a bankrupt on the 29th day of September, A. D. 1914, upon voluntary petition filed in this court, and your petitioner, M. P. Freeman was, on the 31st day of October, 1914, appointed and duly qualified as trustee of the estate of said Southern Arizona Smelting Company in bankruptcy, and is now acting as the said trustee.

II.

That among the debts secured by said bankrupt in said bankruptcy proceedings, is one for Twenty-six Thousand Eight Hundred and Eighty-seven Dollars and Seventy-one Cents (\$26,887.71) due Imperial

*Page-number appearing at foot of page of original certified Record.

Copper Company, a Corporation, and that such debt is of such a nature as to be released by a discharge in bankruptcy.

III.

That on or about the 27th day of July, 1911, said Imperial Copper Company was duly adjudicated a bankrupt by the District Court of the First Judicial District of the Territory of Arizona, and the estate of said Imperial Copper Company, bankrupt, is now being administered by this Honorable Court; that John H. Martin is the duly appointed, qualified and acting trustee of the estate of said Imperial Copper Company, bankrupt. [1b]

IV.

That at the time of the filing of the petition, in which said Southern Arizona Smelting Company was adjudicated a bankrupt, as aforesaid, a suit was pending in the Superior Court of the county of Pima, State of Arizona, entitled "M. P. Freeman as Trustee of the Imperial Copper Company, a Corporation, Bankrupt, versus Southern Arizona Smelting Company," founded upon the debt aforesaid, from which a discharge in bankruptcy would be a release, and that the suit is still pending therein; that if such suit is not stayed, great injury will be done your petitioner, and the estate of Southern Arizona Smelting Company to be administered in bankruptcy herein.

V.

During, or about the month of June, 1914, your petitioner then being the duly appointed, qualified and acting trustee in bankruptcy of said Imperial Copper Company resigned his position as such trus-

tee, and John H. Martin was thereupon duly appointed as such trustee, and qualified as such, and at all times since, has been, and is now, acting as such trustee.

VI.

That within the period of four months prior to the filing of the petition in bankruptcy herein, plaintiff in said action caused a writ of attachment to be issued therein which within said period of four months was levied upon real estate of said Southern Arizona Smelting Company, including its smelting plant, situated in Pinal County, Arizona, being substantially all of the estate of said bankrupt; that the property covered by the lien of said attachment is in the actual possession and control of your petitioner as trustee of the estate of said bankrupt.

VII.

Your petitioner is informed and believes, and upon such [2] information and belief alleges the fact to be that the petition in bankruptcy herein was filed by the bankrupt because of the existence of said attachment lien, and was filed within the period of four months after the levy of said attachment in order to prevent the plaintiff in said action from securing a preference by and through said attachment; that at the time of the levy of said writ of attachment, said Southern Arizona Smelting Company was, at all times since has been and now is insolvent, and the line of said attachment was wholly discharged and released by the adjudication of bankruptcy herein, and thereby rendered null and void.

WHEREFORE, your petitioner prays that a day

be set for the hearing of this petition; that an order of this Court be regularly issued and served upon John H. Martin, trustee, requiring him to appear upon said day and show cause why an injunction should not be issued as herein prayed, and that upon such hearing, further proceedings in said suit may be stayed pursuant to the bankruptcy laws of the United States in such action made and provided, and that an injunction may be issued out of this Honorable Court directed to the said John H. Martin, trustee of the Imperial Copper Company, bankrupt, restraining him, his agents, servants, attorneys and counsellors from further prosecuting said suit in said court, and for such other and further relief as to the Court may seem proper.

(Signed) M. P. FREEMAN,

(Signed) ELLINWOOD & ROSS,

Attorneys for M. P. Freeman, Trustee of Southern
Arizona Smelting Company, Bankrupt. [3]

State of Arizona,

County of Cochise,—ss.

I, M. P. Freeman, petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true to the best of my knowledge and belief.

(Signed) M. P. FREEMAN.

Subscribed and sworn to before me this 16th day of March, 1915.

[Seal]

(Signed) JOHN W. MAYS,

Notary Public.

My commission expires March 4, 1919.

[Endorsements]: B-9 (Tucson). In the District Court of the United States for the District of Arizona. In the Matter of the Southern Arizona Smelting Company, a Corporation, Bankrupt, Petition for Injunction to Stay Suit in State Court. Filed March 18th, A. D. 1915, at 12 M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.
[4]

**[Order Directing John H. Martin, as Trustee, of
Imperial Copper Co. to Show Cause.]**

*In the District Court of the United States for the
District of Arizona.*

In BANKRUPTCY—No. B-9 (Tucson).

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,
Bankrupt.

Application having been made by M. P. Freeman, trustee of Southern Arizona Smelting Company, bankrupt, for an order staying further proceedings in a certain suit in the Superior Court of the State of Arizona, in and for Pima County, entitled M. P. Freeman, as trustee of the Imperial Copper Company, a corporation, bankrupt, vs. Southern Arizona Smelting Company, a corporation, and now entitled John H. Martin, as trustee of the Imperial Copper Company, a corporation, bankrupt, against Southern Arizona Smelting Company:

Now, on motion of Messrs. Ellinwood & Ross, attorneys for the said applicant, it is ordered: That the said John H. Martin, as trustee of the Imperial

Copper Company, a corporation, bankrupt, the plaintiff in said action, show cause before me, District Judge, at the United States District courtroom in the city of Tucson, Pima County, Arizona, in said District, on the 3d day of April, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard, why a writ of injunction should not issue out of *an* under the seal of said court, as prayed for in said petition.

Let service of this order on said John H. Martin, as trustee in bankruptcy of the Imperial Copper Company, a corporation, bankrupt, the plaintiff, by delivering to him personally, or to his attorney of record, a copy of the same and of the petition on which it is granted, within ten days previous to the day last hereinabove mentioned, be sufficient.

Dated this 18 day of March, 1915.

(Signed) WM. H. SAWTELLE,
Judge.

[Endorsements]: No. B-9 (Tucson). In the United States District Court for the District of Arizona. In the Matter of Southern Arizona Smelting Co., a Corporation, Bankrupt. Order to Show Cause on Motion to Stay Suit, Filed March 18, A. D. 1915, at 2:30 P. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

Service admitted with copy of petition this 18th day of March, 1915.

FRANCIS M. HARTMAN,
E. F. JONES,

Attorneys for Plaintiff. [5]

*In the United States District Court for the District
of Arizona.*

In the Matter of the SOUTHERN ARIZONA
SMELTING COMPANY, a Corporation,
Bankrupt.

**Answer of John H. Martin, Trustee of the Imperial
Copper Company, a Corporation, Bankrupt, to
Order to Show Cause, Heretofore Issued Herein
and to Petition Heretofore Filed Herein by M.
P. Freeman, Trustee of the Southern Arizona
Smelting Company, a Corporation, Bankrupt**

Now comes John H. Martin, trustee in bankruptcy
of the Imperial Copper Company, a corporation,
bankrupt, and makes answer to the order to show
cause heretofore issued herein on March 18, 1915, and
to the petition heretofore filed herein by M. P. Free-
man, trustee of the Southern Arizona Smelting Com-
pany, a corporation, bankrupt, as follows:

I.

That heretofore, on July 5th, 1911, a petition in
bankruptcy was filed against the Imperial Copper
Company, a corporation duly organized, created by
and existing under and by virtue of the laws of Ari-
zona, and doing business at the county of Pima, in
said State (then Territory). That thereafter on
July 25, 1911, said Imperial Copper Company was
duly adjudged a bankrupt. That thereafter on
August 12, 1911, M. P. Freeman was elected trustee
of said estate and qualified as such and acted as such
trustee until on or about July 2, 1914, at which time

respondent herein was duly elected and qualified as such trustee to fill the vacancy caused by the resignation of said M. P. Freeman, and your respondent is now, and ever since has been the duly elected, qualified and '[6]' acting trustee in bankruptcy of said Imperial Copper Company.

II.

That the said Southern Arizona Smelting Company was organized under the laws of Arizona some time in the year 1906, with its principal place of business at the county of Pima, state of Arizona, and that said corporation became the owner of and now owns and holds in its corporate name a large, up-to-date smelting plant, situate at the town of Sasco, Pinal County, Arizona, which said smelting plant cost to exceed the sum of six hundred thousand dollars, together with a large tract of land on which said plant is situated. A schedule of which said properties so belonging to said smelting plant is attached hereto and made a part hereof, marked exhibit "A."

III.

That at the time of the bankruptcy of said Imperial Copper Company, your respondent is informed and believes and upon such information and belief alleges that the said smelting company was indebted to the said Imperial Copper Company in the sum of twenty-six thousand, eight hundred eighty-seven and $71/100$ dollars, for balance due on account of goods, wares and merchandise sold and delivered by said Imperial Copper Company to said smelting company, and for services performed by the said Imperial Copper Company for said smelting company

and for moneys paid by said copper company for the use and benefit of the said smelting company, furnished, done and performed at the request of said smelting company, between the first day of January, 1910, and the fifth day of July, 1911. [7]

IV.

That on January 23, 1912, the said M. P. Freeman, as trustee in bankruptcy of the said Imperial Copper Company, bankrupt, instituted an action in the then District Court of the Territory of Arizona, in and for the county of Pima, against said Southern Arizona Smelting Company, to recover from the said smelting company the said sum of \$26,887.71, upon said indebtedness, and that said action is still pending undetermined in the Superior Court of the State of Arizona, in and for the county of Pima, the successor of said court; and that nothing was done in said action up until on or about June 17, 1914, as hereinafter set forth, excepting that summons and complaint was served upon Geo. W. Dietz, secretary of said Smelting Company, on January 25th, 1912.

V.

That during all of said time as above set forth the said M. P. Freeman was also receiver of the property of said Imperial Copper Company under a certain foreclosure suit brought against it by the Bankers' Trust Company of New York, in the said District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima.

VI.

That on or about June 6, 1914, certain creditors whose claims had been filed and allowed in the mat-

ter of the bankruptcy of the Imperial Copper Company made an application in writing upon the said M. P. Freeman, trustee in bankruptcy of said Imperial Copper Company, to cause to be issued an attachment in said suit and cause the same to be levied upon the property of said smelting company and tendered to and agreed to furnish to said Freeman, trustee, a good and sufficient attachment bond in the sum of thirty-two thousand [8] dollars, as required by law, but that the said Freeman declined to comply with said application.

That on or about the said 6th day of June, 1914, the said creditors of said copper company filed in the said bankruptcy proceedings of said Imperial Copper Company, with F. H. Bernard, Esq., the referee before whom said proceedings were pending, a petition praying for an order that the said M. P. Freeman, as trustee of said Imperial Copper Company cause to be issued an attachment in said action and cause the same to be levied upon the property of said smelting company and caused notice of said petition to be served upon said Freeman as such trustee.

That the said Freeman, as trustee of said Imperial Copper Company, appeared before said referee, by his attorney, Selim M. Franklin, Esq., and filed an answer to the petition of said creditors and resisted such application, and the said referee denied such application on or about June 8, 1914.

That thereupon said creditors filed a petition for review of the said order so made and entered by the said F. H. Bernard, referee, which said petition for review was thereafter heard by this Honorable Court

and on or about the 16th day of June, 1914, this Court made and entered an order ordering said M. P. Freeman, as trustee in bankruptcy of said Imperial Copper Company to cause to be issued an attachment in the said suit of M. P. Freeman, trustee, against said smelting company, and cause the same to be levied upon the property of said smelting company, upon the said creditors furnishing to said M. P. Freeman, as such trustee, an attachment bond in the sum of thirty-two thousand dollars.

That thereafter the said creditors procured and furnished to the said M. P. Freeman, as trustee of said Imperial Copper [9] Company an attachment bond in the sum of thirty-two thousand dollars, and on June 17, 1914, the said M. P. Freeman, as trustee of said Imperial Copper Company, bankrupt, in obedience to said order, of this court, caused to be issued in said action a writ of attachment and caused the same on the 19th day of June, 1914, to be levied upon all of the property of said smelting company, described as follows, to wit:

“All of the Southwest Quarter (SW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 160 acres, more or less.

All of the East Half (E. $\frac{1}{2}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 320 acres, more or less.

All of the East Half (E. $\frac{1}{2}$) of the Northwest Quarter (NE. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B.

& M., Pinal County, Arizona, containing eighty (80) acres, more or less.

All of the West Half (W. $\frac{1}{2}$) of the Northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less.

All of the North Half (N. $\frac{1}{2}$) of the Northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty-nine (29), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less.

together with all the fixtures, improvements and appurtenances thereon or annexed thereto," and being more particularly described in the schedule hereunto annexed and marked Exhibit "A." [10]

That true copies of the complaint in said action of M. P. Freeman, as trustee of the Imperial Copper Company, a corporation, bankrupt, against the Southern Arizona Smelting Company, a corporation, defendant, also the affidavit of attachment, writ of attachment, levy and return of the officer, are attached hereto and made a part hereof, marked exhibits "B," "C," and "D."

VI.

That on or about September 29, 1914, the said Southern Arizona Smelting Company filed herein its voluntary petition in bankruptcy and on the same day was adjudicated a bankrupt upon said voluntary petition, and thereafter on or about the 30th day of October, 1914, said M. P. Freeman was elected trustee in bankruptcy of said smelting company and duly

qualified as such and is now and has been ever since said date the duly elected, qualified and acting trustee in bankruptcy of said corporation.

That said smelting company on said September 29, 1914, filed herein, along with its said voluntary petition, certain schedules of debts and assets, and listed as such debts, the following:

Taxes for 1913	\$1,784.89
Louis St. Louis, Keeper, 4 months at \$100 per mo.	400.00
Geo. W. Dietz, Manager & Bookkeeper, 4 months at \$100.00 per month.....	400.00
Colorado Fuel & Iron Co., Denver, Colo., 2 promissory notes	27,759.71
Consolidated National Bank of Tucson, promissory note	10,000.00
Aubry & Semple, El Paso, Texas, promis- sory note	1,878.39
El Paso Foundry & Machine Co., El Paso, Texas, promissory note	901.25
Poland Mining Company, Prescott, Ari- zona, promissory note	311.05
B. P. Cheney and F. M. Murphy, promis- sory note	1,500.00
F. M. Murphy, promissory note	4,755.79
B. P. Cheney, Boston, Mass., promissory note	2,974.11
Imperial Copper Company, balance due...	26,887.71
Arizona Southern Railroad Company....	10.00

VII.

That the following debts were listed in said schedules under the head of accommodation paper:

“Joint notes of Arizona Southern Railroad Company and petitioner (Southern Arizona Smelting Company), executed by petitioner (Southern Arizona Smelting Company), as joint maker for accommodation of the Arizona Southern Railroad Company.

Date.	Holder.	Residence.	Amount.
1-2-12.	B. P. Cheney & F. M. Murphy,		
	Boston & Prescott		\$13,396.11
9-1-13.	do do do do do do....		28,566.07
5-1-14.	B. P. Cheney, Boston		6,000.00
4-9-14.	Consolidated National Bank of		
	Tucson		10,000.00
7-1-12.	Colorado & Wyoming RR. Co.,		
	Denver, Col.		721.36
	do do do do ...		84.11
6-1-13.	El Paso & S. W. System, El Paso,		
	Tex.		4,820.47
6-1-13.	Stag Canyon Fuel Co.....		1,263.07
Total Accommodation Paper,			\$64,841.82

VIII.

That your respondent is informed and believes and upon such information and belief alleges that each, all and every of the above-mentioned claims and debts so listed by the said smelting company under the head of accommodation paper are invalid and illegal and not proper and just debts of said smelting company and cannot be proved or allowed in this bankruptcy proceeding as debts against said smelt-

ing company, and should not be permitted to be proved or allowed as just and valid debts against said smelting company for the reason that each, all and every of the said obligations were attempted to be executed by the said Southern Arizona Smelting Company as joint maker for the accommodation of a certain other corporation, to wit, the Arizona Southern Railroad Company; that said smelting company received no consideration or benefit whatsoever from either or any of said obligations; that the attempted execution of each, all and every of said notes [12] by the said smelting company was and is *ultra vires*; that each all and every of said notes were given for debts owing by the said Southern Arizona Railroad Company; and that the said smelting company was not in any way responsible or liable for such debts of the said railroad company; that the said smelting company had no power or authority to make, execute or deliver either or any of said notes; and that neither of the holders of said notes is a *bona fide* holder thereof for value without notice of all the matters and things hereinbefore set forth, with the possible exception of the said Consolidated National Bank of Tucson, so scheduled as the holder of that certain accommodation note, dated April 4, 1914, for the sum of ten thousand dollars, and that if the said Consolidated National Bank of Tucson is a *bona fide* holder without notice of said note, that then and in that event the said smelting company is entitled to recover of and from the said Arizona Southern Railroad Company said sum of ten thousand dollars and interest; and in case said

claim on said accomodation note should be allowed as a claim against said smelting company herein, that then and in that event the said smelting company has a just and valid claim against said railroad company and such claim should be taken into account as an asset of the said smelting company; and your respondent is informed and believes and therefore alleges that the said debt could be collected from the said railroad company.

IX.

That certain of the claims so founded upon such accommodation paper have been filed by the holders thereof before the Referee who has charge of these proceedings, as follows:

B. P. Cheney and F. M. Murphy.	\$13,396.11
B. P. Cheney and F. M. Murphy.	28,566.70
B. P. Cheney	6,000.00
Consolidated National Bank....	10,000.00

[13]

and your respondent is informed and believes and upon such information and belief alleges that the said M. P. Freeman, as trustee of said smelting company has taken no steps to object to the allowance of either or any of such claims so filed.

X.

This respondent denies that at the time of the issuance and levy of said attachment or at any time the said smelting company was insolvent.

And respondent alleges that at the time of the levy of said attachment, to wit, on the 19th day of June, 1914, and at the time of the filing of the petition in bankruptcy herein, to wit, the 29th day of

September, 1914, and at all the times mentioned herein the said smelting company was and is solvent and that the aggregate of the property of said smelting company, exclusive of any property which it may have transferred, concealed or removed, or attempted to conceal or remove, with intent to defraud, hinder or delay its creditors, was and is, at a fair valuation thereof, sufficient in amount to pay its debts.

XI.

Respondent denies that the lien of said attachment was wholly discharged and released by the said adjudication of bankruptcy herein and denies that the attachment lien was rendered null and void by the said adjudication in bankruptcy.

Respondent alleges that the lien of said attachment is a valid and subsisting lien against all of the property of said smelting company so levied upon as appears from said writ and as of the date of said levy, and that respondent, as trustee in bankruptcy of said Imperial Copper Company, a corporation, bankrupt, is entitled to have said lien adjudged to be a valid and subsisting lien to secure the payment of [14] debt and to have the same foreclosed in accordance with the law in such cases made and provided.

XII.

That heretofore, on or about the —— day of ———, 1915, your respondent, John H. Martin, as trustee in bankruptcy of the said Imperial Copper Company, a corporation, bankrupt, was substituted as plaintiff in said action so pending in said Superior

Court, in place of the said M. P. Freeman, as such trustee.

WHEREFORE, respondent prays:

1. That this Court proceed to hear said matter and take evidence with reference to the question of the insolvency of said smelting company, or that said matter be referred to the referee herein to hear and take evidence upon such question, and that the said smelting company be adjudged to be solvent at the time of said attachment and at the time of the filing of said petition in bankruptcy, and at all times mentioned herein.

2. That the lien of this respondent, as trustee in bankruptcy of the said Imperial Copper Company, a corporation, bankrupt, under said attachment be adjudged to be a valid and subsisting lien on all of the property of said smelting company so levied upon, as of the date of said levy, to secure the payment of said debt in the sum of \$26,887.71 with interest thereon at the rate of six per cent per annum from the 5th day of July, 1911, until paid, and for all costs incurred in said action, and that said lien be foreclosed.

3. That said order to show cause be dismissed.

4. And for any other further, special or general relief as to the Court may seem meet and proper and for costs.

(Signed) FRANCIS M. HARTMAN,
EDWIN F. JONES,

Attorneys for John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt. [15]

State of Arizona,

County of Pima,—ss.

John H. Martin, being first duly sworn, deposes and says that he is the trustee in bankruptcy of the Imperial Copper Company, a corporation, bankrupt and the respondent above named: That he has read the foregoing answer and petition and knows the contents thereof and that same is true in substance and in fact, of his own knowledge, except as to matters and things therein stated on information and belief, and as to such matters and things he believes it to be true.

(Signed) JOHN H. MARTIN.

Subscribed and sworn to before me this 31 day of March, A. D. 1915.

My commission expires Feb. 19, 1916.

[Seal] (Signed) R. W. LANGWORTHY,
Notary Public, Pima Co., Arizona. [16]

Exhibit "A" [to Answer of John H. Martin, Trustee—Inventory.]

**INVENTORY OF SOUTHERN ARIZONA
SMELTING CO.'S PROPERTY.**

(POWER-HOUSE.)

- 1 Pawling & Hernaishifeger Crane, capacity 20,000 lbs.
- 3 Large Nordberg Engines, compressors & blowers, complete.
- 1 Westinghouse Standard Engine and alternating current generator 440 volts.

- 1 Ingersoll-Rand Compressor, size 16x12-14x12-10x12-9x12.
 - 1 Westinghouse Induction Motor, 75 hp. & 400 volts.
 - 1 Westinghouse Direct current generator, 250 volts.
 - 1 Westinghouse Induction motor, constant speed 75 hp. 400 volts.
 - 1 Westinghouse Direct current generator, 125 volts.
 - 1 Westinghouse Standard Engine, size 6x7.
 - 1 Westinghouse current generator 125 volts.
 - 1 Westinghouse Parsons Steam turbine, 3600 R. P. M.
 - 1 Westinghouse alternating current generator, 3600 R. P. M. 440 vlt.
 - 1 Alberger dry vacuum pump, size 6x14x14x10.
 - 1 Alberger surface condenser, size 2,000.
 - 1 Alberger condenser engine, size 7 & centrifugal pump.
 - 1 Alberger dry vacuum pump, size 6x14x10.
 - 1 Alberger condenser engine, size 6 & centrifugal pump.
 - 1 Alberger surface condenser, size 1400.
 - 1 Atlas Gasoline Engine, size 8x10 and centrifugal pump.
 - 1 Oil pump and 2 self oil feeders.
- large amount of electrical equipment.

(BOILER-HOUSE.)

- 4 large marine boilers complete.
- 2 Fairbanks-Morse pumps, complete.

- 1 Hoppes Mnfg. Co. Exhaust heater.
- 2 oil pumps.

(SMELTER.)

- 2 large furnaces complete for smelting copper ore, stacks, etc.
- 5 iron flat cars, each carrying 6 moulds for matte.
- 36 extra matte moulds.
- 6 converters and 2 converter stacks.
- 8 large converter matte pots.
- 1 Emence Electric Crane.
- 1 Small electric crane, 1 Small electric engine.
- 2 Baldwin Locomotive works electric engines, R.
R. main floor.
- 24 large smelter side frames.
- 1 Chilean Mill and two extra rolls (stone).
- 1 Automatic electric starter, 400 volts.
- 2 stone crushers.
- 1 wood water-tank.
- 2 Westinghouse motors, about 30 hp. each.
- 2 5" centrifugal pumps.
- 2 Baldwin Locomotive works elec. R. R. Engines,
2d floor.
- 12 Arthur Kopple Co. Iron ore cars, self-dumping.
- 1 R.R. platform scale, main floor.

(SAMPLING WORKS.)

- 1 Power & Uling Mnfg. Co. rock-crusher 20x106
ext jaws.
- 2 Power & Uling Mnfg. Co. rock-crusher smaller.
- 2 large ore samplers.
- 1 small ore sampler.
- 2 elevator belt conveyors for ore, beling complete,
50 ft.

- 1 Westinghouse induction motor, 40 hp.
- 1 Westinghouse automatic starter, 400 volts.
- 1 Westinghouse induction motore, abt 20 hp.
- 1 Fairbanks No. 04 platform scale.
- 1 wheelbarrow.
- 1 lot assay equipment, old.
- 1 ore bin.
- several carloads of coke. [17]
- 1 wheelbarrow.
- 36 large ore bins complete, arranged to dump ore from R.R.
- 30 auto cars with scales to weight ore from cars to smelter.
- 1 steam donkey-engine to hoist tram cars.
- 1 platform scale, for weighing flue dust.
- 1 roll copper wire cabel, 1/2".

(SMELTER STOREHOUSE.)

- 2 5" centrifugal pumps.
- 2 Westinghouse induction motors, 40 hp.
- 1 Westinghouse induction motor, 20 hp.
- 2 Westinghouse induction motors, 30 hp.
- 1 Westinghouse induction motor, 10 hp.
- 2 Westinghouse automatic starters, about 400 volts.
- 1 Westinghouse electric light starter.
- 3 chain block and tackle with hemp rope.
- 6 wheelbarrows, iron.
- 2 valves, size 8x6 & large quantity of small valves.
- 1 lot old tools, shovels, coke forks, rivets, bolts, pipe, etc.
- 15 cases machine oil.
- 4 large cast iron pots for smelter, on platform.

- 10 rock-crusher jaws.
- 1 large rotary pressure blower, outside of building.
- 1 lot, large assortment of castings, rivits, bolts, pipes, etc.

(MISCELLANEOUS NEAR SMELTER.)

- 4 R.R. hand cars, standard gauge.
- 3 slag cars, standard gauge.
- 1 R.R. engine, standard gauge.
- 3 Pcs. flue dust pipe, about 5' in diameter, 5 pcs. spiral pipe, about 16" in diam.
- 1 oil tank, capacity 140,000 gal.
- 1 pump for pumping oil into tank from reservoir at R.R.
- 1 large cement mixer with steam boiler & engine on wheels.
- 1 clay machine, complete, with moulds.
- 2 large water-coolers.
- 1 water-tank, capacity 115,000 gal.
- 1 water-tank, capacity 20,000 gal.
- 2 water-tanks, capacity 2,500 gal.
- 1 steel smokestack, 14'x185' in height.
- 1 brick building for flue dust, complete.
- 1 lot timbers, small amount, scattered around.
- 10 large steel ore cars, standard Gauge RR.

(REPAIR-SHOP BUILDING.)

- 1 gasoline engine, 12 hp. complete.
- 3 Westinghouse induction motors, abt. 40 hp.
- 1 large lathe.
- 2 large plainers for steel work.
- 1 hydraulic drill.

- 2 hydraulic drills small.
- 2 Emery stones and complete equipment.
- 1 thread machine for bolts.
- 1 thread machine for pipe.
- 1 large planer for steel.
- 1 large grindstone.
- 2 vices and 3 work benches.
- 1 lot, large asstmt., flue-pipe, water-pipe, bolts, castings.
- 1 large shear for cutting iron.
- 1 large bender for bending iron.
- 2 vices and 1 workbench.
- 1 large vise, upset.
- 1 wrench.
- 1 blacksmith drill.
- 3 anvils.
- 3 blacksmith forges.
- 1 lot blacksmith tools and bar iron. [18]

(COMPANY STORE.)

- 9 glass show-cases.
- 2 large wooden counters.
- 3 counter scales.
- 1 1000 lb. platform scale.
- 2 butchers scales.
- 1 chopping block.
- 1 large ice-box.
- 1 small ice-box.
- 1 1 bar ice-box combination.
- 1 meat-saw.
- 1 butcher's axe.
- 1 trunk truck.

- 1 sausage-grinder.
- 1 tobacco-cutter.
- 2 safes.
- 1 roll-top desk.
- 1 typewriter desk.
- 1 filing case.
- 2 chairs.
- 2 stools.
- 1 letter-press.
- 1 table.
- 1 step-ladder.
- 2 rope-reels.
- 1 plow.
- 1 harrow.
- 1 scraper.

(DRAFTSMAN'S OFFICE.)

- 1 roll top desk, 1 heating stove, 3 tables, 4 chairs.
- 4 draughtsman tables, 1 surveyor's steel tape.
- 1 letter-press, 1 wall clock, 1 lot wooden stools.
- 3 lockers, 1 hand-saw, 1 lot blank smelter returns,
etc.

(BOARDING-HOUSE.)

- 2 ranges, 7 tables.

(ASSAY OFFICE.)

- 2 balances, assorted chemicals.

(COMPANY BUILDINGS.)

- 1 sampling works bldg, lg. 50 ft. high, wood frame,
iron sides and roof
- 1 smelter building, steel frame and cor. iron
sides & roof, 60x100.
- 1 flue dust building.

- 1 storage building, lime, etc.
- 1 power hs. bldg., steel frame, cor iron sides and roof, 60x100.
- 1 power hs. bldg., steel frame, cor iron sides and roof, 50x80.
- 1 open platform for coal.
- 1 smelter repair bldg., wood frame, cor. iron sides and roof, 40x12.
- 1 smelter supply bldg., wood frame cor. iron sides and roof, 40x80.
- 1 wood work-shop & assay off. bldg., wood frame and cor. iron sides and roof, 40x80.
- 1 pay off and draughtman's office, wood, 3 rooms.
- 1 9-room brick dwelling, plastered outside.
- 1 barn and corral.
- 1 16-room adobe lodging-house.
- 1 boarding-house, dining-room and kitchen, wood and canvass.
- 1 gen. mdse. bldg., frame 40x80.
- 1 frame dwelling.
- 6 tent frames. [19]

*In the District Court of the First Judicial District
of the Territory of Arizona, in and for the
County of Pima.*

**Exhibit "B" [to Answer of John H. Martin, Trustee
—Complaint].**

M. P. FREEMAN, as Trustee of the IMPERIAL
COPPER COMPANY, a Corporation, Bank-
rupt,

Plaintiff,

vs.

SOUTHERN ARIZONA, SMELTING COMPANY,
a Corporation,

Defendant.

Plaintiff complains of defendant and alleges:

I.

That at all the times hereinafter mentioned, the Imperial Copper Company was, and still is, a corporation, organized under the laws of the Territory of Arizona, and that Southern Arizona Smelting Company, the defendant herein, during all of said times hereinafter mentioned, was and still is, a corporation, duly organized and existing under and by virtue of the laws of the Territory of Arizona.

II.

That on the 27th day of July, 1911, the said The Imperial Copper Company, a corporation as afore-said, was adjudicated a bankrupt by the District Court of the First Judicial District of the Territory of Arizona, upon a petition filed in said court against said corporation on the 5th day of July, 1911, and that thereafter, and on the 12th day of August,

1911, plaintiff herein was duly appointed the trustee of said bankrupt in the matter of the bankruptcy of said corporation aforesaid, and did file his bond as such trustee, which bond was duly approved by said Court of Bankruptcy on the 26th day of August, 1911, and thereafter and on the 29th day of [20] August, 1911, a certified copy of the said order of adjudication and of the approval of said bond were duly filed and recorded in the office of the county recorder of said Pima County; that the said appointment of this plaintiff as such trustee has not been revoked and this plaintiff is still the trustee of the said the Imperial Copper Company, a bankrupt, as aforesaid. That thereafter and on the 18th day of January, 1912, the referee in bankruptcy did authorize and direct this plaintiff, as trustee, as aforesaid to bring this suit.

III.

That on the 5th day of July, 1911, being the day when the petition in bankruptcy against said The Imperial Copper Company was filed with the said Court aforesaid, the said defendant was indebted to the said The Imperial Copper Company in the sum of \$26, 887.71, for balance of an account for goods, wares and merchandise sold and delivered by the said Imperial Copper Company to said defendant, and for services performed by the said The Imperial Copper Company for the said defendant, and for moneys paid by the said The Imperial Copper Company for defendant's use; the whole furnished, done and performed at the request of the

defendant, between the first day of January, 1910, and the 5th day of July, 1911.

That defendant had not paid the said sum, or any part thereof, either to the said The Imperial Copper Company, or to this plaintiff, and that there is now due, owing and unpaid from said defendant, to this plaintiff, as trustee, as aforesaid, the sum of \$26,887.71, with interest thereon at the rate of 6% per annum from the 5th day of July, 1911.

WHEREFORE, plaintiff, as trustee as aforesaid, prays judgment against said defendant with interest thereon at the rate of 6% per annum from the 5th day of July, 1911, until paid, and for costs.

FRANCIS M. HARTMAN,
SELIM M. FRANKLIN,
Attorneys for Plaintiff.

(Filed 23d 1912.) [21]

**.Exhibit "C" [to Answer of John H. Martin,.
Trustee— Affidavit of Attachment.]**

*In the Superior Court of Pima County, State of
Arizona.*

M P. FREEMAN, as Trustee of the IMPERIAL
COPPER COMPANY, a Corporation, Bank-
rupt,

Plaintiff,

vs.

SOUTHERN ARIZONA SMELTING COMPANY,
a Corporation,

Defendant.

The State of Arizona,
County of Pima,—ss.

M. P. Freeman, as trustee of Imperial Copper Co., Bankrupt, being duly sworn, says: That he is the plaintiff in the above-entitled action, and that the defendant is indebted to plaintiff upon an implied contract *contract* for the direct payment of money, and such contract was made and is payable in the State of Arizona, and the payment of same is not secured by any mortgage or lien upon any real or personal property, or any pledge of personal property, and the character of said indebtedness is as follows, to wit: for goods, wares and merchandise sold and delivered by said Imperial Copper Company to the defendant; services performed by said Imperial Copper Company for defendant; and for moneys paid by the said Imperial Copper Company for defendant's use; the whole furnished, done and performed at the request of defendant between the first day of January, 1910, and the 5th day of July, 1911, and of the reasonable value of \$26,887.71.

That the same is due plaintiff over and above all legal set-offs or counterclaims, and that demand has been made for payment of the amount due.

That the Attachment is not sought for wrongful or malicious purposes, and the action is not prosecuted to hinder or delay any creditor of the defendant.

M. P. FREEMAN,
Trustee.

Subscribed and sworn to before me this 17th day of June, 191—

LILLIE THOMAS,

Notary Public,

Clerk of the Superior Court in and for Pima County.

(Filed June 17th, 1914.) [22]

[**Exhibit "D" to Answer of John H. Martin, Trustee
—Writ of Attachment.**]

*In the Superior Court of Pima County, State of
Arizona.*

M. P. FREEMAN, as Trustee of the IMPERIAL
COPPER COMPANY, a Corporation, Bank-
rupt,

Plaintiff,

vs.

SOUTHERN ARIZONA SMELTING COMPANY,
a Corporation,

Defendant.

The State of Arizona to the Sheriff or any Constable of the County of Pinal, GREETING:

We command that you attach forthwith so much of the property of Southern Arizona Smelting Company, or corporation, if to be found in your County, on security, as shall be of value sufficient to make the sum of \$26,887.71 dollars, with interest at six per cent per annum from July 5th, 1911, and the probable costs of suit, to satisfy the demand of M. P. Freeman, as Trustee of the Imperial Copper Company, a corporation, bankrupt, and that you keep secure in your hands the property so attached, unless replevied, that the same may be liable to

further proceedings thereon, to be had before the Court, and that you make return of this writ showing how you have executed the same.

Witness, Hon. WILLIAM F. COOPER, Judge of said court, at the Court House, in the said County of Pima, this 17th day of June, 1914.

Attach my hand and seal of the said Court, the day and year last above written.

[Seal]

S. A. ELROD,
Clerk.

By _____
Deputy. [23]..

*In the Superior Court of the State of Arizona, in and
for the County of Pima.*

M. P. FREEMAN, as Trustee in Bankruptcy of the
IMPERIAL COPPER COMPANY, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

SOUTHERN ARIZONA SMELTING COMPANY,
a Corporation,

Defendant.

**Levy of Attachment—Forming Part of Exhibit “D”
to Answer of John H. Martin, Trustee.**

State of Arizona,
County of Pinal,—ss.

I, the undersigned, Sheriff of Pinal County, State of Arizona, do hereby certify that I received the within writ of attachment at the hour of one o’clock, P. M. on the 19th day of June, 1914, and I do hereby

levy the same upon the following described property of the within-named defendant, Southern Arizona Smelting Company, a corporation, situated in the county of Pinal, state of Arizona, to wit:

All that certain real estate situate at Sasco, in said county and state, belonging to the said Southern Arizona Smelting Company, upon which is situate the smelting plant belonging to said company, and more particularly described as follows:

All of the Southwest Quarter (SW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 120 acres, more or less.

All of the East Half (E. $\frac{1}{2}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M. [24] Pinal County Arizona, containing 320 acres, more or less.

All of the East Half (E. $\frac{1}{2}$) of the northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less.

All of the West Half (W. $\frac{1}{2}$) of the Northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less.

All of the North Half (N. $\frac{1}{2}$) of the Northwest Quarter, (NW. $\frac{1}{4}$) of Section Twenty-nine (29), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less.

—together with all the fixtures, improvements and appurtenances thereon or annexed thereto.

WITNESS my hand this 19th day of June, A. D. 1914.

HENRY D. HALL,
Sheriff of Pinal County, Arizona,
By JOE T. KINNEY,
Chief Deputy. [25]

*In the Superior Court of the State of Arizona, in and
for the County of Pima.*

M. P. FREEMAN, as Trustee in Bankruptcy of the
IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

SOUTHERN ARIZONA SMELTING COMPANY,
a Corporation,

Defendant.

State of Arizona,
County of Pima,—ss

I, Henry D. Hall, sheriff of Pinal County, State of Arizona, do hereby certify that the foregoing is a true and correct copy of a writ of attachment issued out of the above-entitled action and with the endorsement of levy thereon.

WITNESS my hand this 19th day of June, A. D. 1914.

HENRY D. HALL,
Sheriff of Pinal County, Arizona,
By JOE T. McKINNEY,
Chief Deputy. [26]

*In the Superior Court of the State of Arizona, in and
for the County of Pima.*

M. P. FREEMAN, as Trustee in Bankruptcy of
IMPERIAL COPPER COMPANY, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

SOUTHERN ARIZONA SMELTING COMPANY,
a Corporation,

Defendant.

Return on Attachment.

State of Arizona,
County of Pinal,—ss.

I, Henry D. Hall, Sheriff of Pinal County, State of Arizona, do hereby certify that I received the within writ of attachment at the hour of One o'clock P. M. on the 19th day of June, 1914, and that I levied the same upon all of the following described real property, situate in the county of Pinal, State of Arizona, to wit:

All that certain real estate situate at Sasco, in said county and state, belonging to the said Southern Arizona Smelting Company, upon which is situate the smelting plant belonging to said company, and more particularly described as follows:

All of the Southwest Quarter (SW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 160 acres, more or less.

All of the East Half (E. $\frac{1}{2}$) of Section Twenty,

Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 320 acres, more or less.

All of the East Half (E. $\frac{1}{2}$) of the Northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less. [27]

All of the West Half (W. $\frac{1}{2}$) of the Northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty (20), Township Ten (10) South, Range Nine (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less.

All of the North Half (N. $\frac{1}{2}$) of the Northwest Quarter (NW. $\frac{1}{4}$) of Section Twenty-nine (29), Township Ten (10) South, Range (9) East, G. & S. R. B. & M., Pinal County, Arizona, containing 80 acres, more or less—

by endorsing said levy an said writ on said day and by filing with the county recorder of said Pinal County State of Arizona, a true and correct copy of said writ of attachment with the endorsement of said leby thereon, on said day at the hour of 4:30 o'clock, P. M.

WITNESS my hand this 19th day of June, A. D. 1914.

HENRY D. HALL,
Sheriff of Pinal County, Arizona,
By JOE F. McKINNEY,
Chief Deputy.

[Endorsed]:

State of Arizona,
County of Pima,—ss

I, W. L. Brown, Recorder in and for the county of Pinal, state aforesaid, do hereby certify that the annexed instrument was filed and recorded at request of Joe T. McKinney, on the 19 day of June, A. D. 1914, at — minutes past 4 o'clock, in book No. 14 of Miscls, Page 598.

WITNESS my hand and official seal 19 day of June, 1914.

W. L. BROWN,
Recorder.

By M. Obenscoe,
Deputy. [28]

[Endorsements]: No. B-9 (Tucson). In the United States District Court for the District of Arizona. In the Matter of the Southern Arizona Smelting Co., Bankrupt. Answer of John H. Martin, Trustee, etc. to Order to Show Cause and to Petition heretofore filed herein by M. P. Freeman, Trustee, etc. Copy received March 31st, 1915. S. M. Franklin, Attorney for M. P. Freeman, Trustee of Southern Arizona Smelting Co. Filed April 1, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [29]

*In the District Court of the United States for the
District of Arizona.*

IN BANKRUPTCY—No. —

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,
Bankrupt.

**Order That Writ of Injunction Issue to Stay Suit,
etc.**

The application of M. P. Freeman, trustee of Southern Arizona Smelting Company, Bankrupt, for an order staying further proceedings in a certain suit in the Superior Court of the State of Arizona, in and for Pima County, entitled John H. Martin as trustee of the Imperial Copper Company, a corporation, bankrupt, against Southern Arizona Smelting Company, came on to be heard this 21st day of June, 1915, Messrs. Ellinwood & Ross and Selim M. Franklin, Esq., appearing as attorneys for said M. P. Freeman, and Messrs F. M. Hartman and E. F. Jones as attorney for said John H. Martin, and it appearing from the verified answer of said plaintiff, Martin, trustee, that as the trustee in bankruptcy of said Imperial Copper Company he has a probable debt against the Southern Arizona Smelting Company, bankrupt; that a suit is now pending against said bankrupt estate in the Superior Court of the State of Arizona, in and for Pima County, for the enforcement of said debt; that such debt is of such a nature as to be released by a discharge in bankruptcy; that on the 19th day of June, 1914, a writ of attachment in said case was levied upon certain real property of the said Southern Arizona Smelting Company, Bankrupt, situate in Pinal County, State of Arizona; that on September 20, 1914, the said Southern [30] Arizona Smelting Company filed its voluntary petition in bankruptcy herein and on the same day was adjudicated a bankrupt, the filing of said petition and the said adjudication being less than four months

from the date of the levy of the said attachment aforesaid:

NOW, THEREFORE, it is ordered and adjudged, that said attachment lien is null and void, and that the property affected thereby shall be deemed released therefrom, and that the same pass to the trustee of said Southern Arizona Smelting Company, bankrupt, free of said line.

It is further ordered that the said John H. Martin, trustee of the Imperial Copper Company, a corporation, bankrupt, and his agents, servants, attorneys and counsellors, be and they hereby are, enjoined and restrained from prosecuting the said suit aforesaid, against said Southern Arizona Smelting Company, and all proceedings in said suit are hereby stayed, pursuant to the bankruptcy laws of the United States in such cases made and provided.

Dated this 2d day of November, 1915.

WM. H. SAWTELLE.

Judge.

[Endorsements]: No. B-9 (Tucson). In the United States District Court for the District of Arizona. In the Matter of the Southern Arizona Smelting Co., Bankrupt. Order that Writ of Injunction Issue to Stay Suit, etc. Filed Nov. 2, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [31]

*In the United States District Court for the District
of Arizona.*

In the Matter of SOUTHERN ARIZONA SMELT-
ING COMPANY, a Corporation,
Bankrupt.

**Order Allowing Petition for Revision in Matter of
Law.**

WHEREAS, application has been made for revision in matter of law by the Circuit Court of Appeals of the Ninth Circuit of the United States of the order entered herein on the 2d day of November, 1915, and the Court being satisfied that the question there determined is one of which revision may be asked, as provided in Sec. 24-b of the bankruptcy laws of 1898, and that the application should be granted; on motion of Francis M. Hartman, Esq., and Edwin F. Jones, Esq., attorneys for petitioner, IT IS ORDERED:

That the order of this court, made and entered herein on the 2d day of November, be revised in matter of law by the Circuit Court of Appeals of the Ninth Circuit of the United States, as provided by Sec. 24-b of the bankruptcy laws of 1898, and the rules and practice of that court.

That the clerk, within ten days from this date, prepare at the expense of the petitioner, a certified copy of such order and of the record of this case pertinent to such order, and file the same with the clerk of such circuit court of appeals.

WITNESS, the Honorable WILLIAM H. SAW-
TELLE, Judge of the said court, and the seal thereof,

at the city of Tucson, in said district, on the 20th day of November, 1915.

GEORGE W. LEWIS,
Clerk.

By Geo. C. Pollock,
Deputy Clerk. [32]

[Endorsements]: No. B-9. In the United States District Court for the District of Arizona. In the Matter of the Southern Arizona Smelting Company, a Corporation, Bankrupt. Order Allowing Petition for Revision in Matter of Law. Filed Nov. 20, A. D., 1915, at 2 P. M. George W. Lewis, Clerk. By George C. Pollock, Deputy Clerk. [33]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the United States District Court for the District of Arizona.

B-9—TUCSON.

In the Matter of THE SOUTHERN ARIZONA
SMELTING COMPANY, a Corporation,
Bankrupt.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages number 1 to 33 inclusive, constitute and are *a* true, complete and correct *copies* of the Petition for Injunction to Stay Suit in State Court; Order to Show Cause on Motion to Stay Suit; Answer of John H. Martin, Trus-

tee, etc., to Order to Show Cause and to Petition heretofore filed herein by M. P. Freeman, trustee, etc.; Order that Writ of Injunction issue to Stay Suit, etc.; and the Order Allowing Petition for Revision in Matter of Law, filed in the matter of Southern Arizona Smelting Company, a corporation, Bankrupt, No. B-9—Tucson, as the same remain on file and of record in said District Court.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$17.70 and that same has been paid in full by the appellant, John H. Martin, Trustee, in said case. [34]

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District this 24th day of November, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal]

GEORGE W. LEWIS,
Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk. [35]

[Endorsed]: No. 2697. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. John H. Martin, as Trustee of the Estate of Imperial Copper Company, a Corporation, Bankrupt, Petitioner, vs. M. P. Freeman, as Trustee of the Estate of Southern Arizona Smelting Company, a Corporation, Bankrupt, Respondent. Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Arizona.

Filed December 6, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, as Trustee of the Estate of
IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of
SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Respondent.

**SUPPLEMENTAL TRANSCRIPT OF RECORD
IN SUPPORT OF
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain
Order of the United States District
Court for the District
of Arizona.

**[Petition that Southern Arizona Smelting Co. be
Adjudged Bankrupt.]**

*In the District Court of the United States for the
District of Arizona.*

In the Matter of SOUTHERN ARIZONA SMELT-
ING COMPANY, a Corporation,
Bankrupt.

To the Honorable, WILLIAM H. SAWTELLE,
Judge of the District Court of the United States,
for the District of Arizona:

The petition of the Southern Arizona Smelting Company, a corporation organized under the laws of the State of Arizona, having its principle place of business at Silverbell, Pima County, in the State of Arizona, and not a municipal, railroad, insurance or banking corporation, respectively represents:

That it has had its principle place of business and its domicile, for the greater portion of six months and for more than six months next immediately preceding the filing of this petition, at Silverbell, State of Arizona, within said Judicial District.

That this petition is filed pursuant to a resolution passed by the board of directors, at a duly called meeting, held on the 24th day of September, 1914, in the said county of Pima and State, aforesaid, which said resolution is as follows, to wit:

“Whereas, it appears that this Company is largely indebted, and is wholly unable to pay any of its indebtedness, all of which is long overdue; and it is involved in litigation and is with-

out funds with which to pay the necessary expense thereof and has exhausted its ability to borrow money to procure funds for the care and preservation of its property, and [1*] whereas, unless steps be taken to declare this Company, a bankrupt, a pending attachment levied upon the Company's property, may result in one creditor receiving an unjust preference over the other creditors of the Company in like situation, now therefore

Resolved: This Company shall and does hereby declare that it is unable to pay its debts and is willing to be adjudged a bankrupt, under the laws of the United States. Resolved further that it would be for the best interests of this Company and its creditors that it be adjudged a voluntary bankrupt, to which end, G. W. Dietz, the Secretary and Treasurer of the Company, shall be, and he is hereby, duly authorized and empowered and directed, for and on behalf of this Company, to sign, verify, and file in the District Court of the United States, for the District of Arizona, a voluntary petition in bankruptcy, praying that this Company be adjudged a Bankrupt, according to the laws of the United States, and to execute, verify and file with said Court, such further documents, schedules or papers as may be required to enable this Company to fully avail itself of the benefit of said laws.

And he is further authorized and empowered, on behalf of this Company, and in its name, to

*Page-number appearing at foot of page of original certified Supplemental Record.

do all other matters and things necessary, advisable or proper to be done for the purpose of carrying out the intent of this resolution.”

that the corporation owes debts which it is unable to pay in full; that it is willing to surrender all of its property for the benefit of its creditors and desires to obtain the benefit of the Acts of Congress relating to bankruptcy; that the schedule hereto annexed marked “A,” verified by the secretary and treasurer of your petitioner under oath, contains a full and true statement of all of its debts, and, so far as it is possible to ascertain, the names and place of residence of its creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed marked “B” and verified by the secretary and treasurer of your petitioner under oath, contains an accurate inventory of all its property, both real and personal, and such further statements concerning said property as is required by the provisions of said acts.

WHEREFORE, your petitioner prays that it may be [2] adjudged by the Court to be a bankrupt within the purview of said acts.

SOUTHERN ARIZONA SMELTING CO.

By GEO. W. DIETZ,

Secy. and Treas.

United States of America,
District of Arizona,
County of Pima,—ss.

I, George W. Dietz, secretary and treasurer of the Southern Arizona Smelting Company, a corporation, the petitioned debtor mentioned and described in the

foregoing petition, do make solemn oath that the statements contained therein are true, according to the best of my knowledge, information and belief; and in pursuance of a resolution passed by the board of directors of said Southern Arizona Smelting Company, at a regular called meeting, held on the 24th day of September, 1914, I have signed the corporate name, and affixed the corporate seal to said petition.

GEORGE W. DIETZ,

Subscribed and sworn to before me this 28th day of September, 1914.

My commission expires January 19, 1918.

[Notarial Seal]

S. D. GROMER,

Notary Public.

[Endorsements]: No. B-9 Docket Tucson. U. S. District Court of Arizona. In the Matter of Southern Arizona Smelting Co., Bankrupt. Debtor's Petition in Bankruptcy. Filed ten o'clock A. M. this 29th day of September, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [3]

[Order Declaring and Adjudging Southern Arizona Smelting Company Bankrupt, etc.]

In the District Court of the United States, District of Arizona.

IN BANKRUPTCY.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY,

Bankrupt.

At Tucson, in said district, on the 29th day of September, 1914, before the said court in bankruptcy, the petition of Southern Arizona Smelting Company, that it be adjudged bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Southern Arizona Smelting Company is hereby declared and adjudged bankrupt accordingly.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Arizona Daily Star," a newspaper published in the city of Tucson, county of Pima, State of Arizona, within the territorial district of this court, and in the county within which said bankrupt resides.

Dated September 29th, 1914.

WM. H. SAWTELLE,

District Judge.

[Endorsements]: B-9 Tucson. In the District Court of the United States for the District of Arizona. In the Matter of Southern Arizona Smelting Company, Bankrupt. Order of Adjudication and Designating Newspaper. Filed Sept. 29, A. D. 1914, at 11 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. Filed Oct. 1, 1914, at 1:30 P. M. F. H. Bernard, Referee. [4]

*In the United States District Court for the District
of Arizona.*

In the Matter of the SOUTHERN ARIZONA
SMELTING COMPANY, a Corporation,
Bankrupt.

JOHN H. MARTIN, as Trustee of the Estate of
Imperial Copper Company, a Corporation,
Bankrupt Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of
SOUTHERN ARIZONA SMELTING CO.,
a Corporation, Bankrupt Respondent.

**Stipulation [for Supplemental Transcript of
Record.]**

IT IS HEREBY STIPULATED by and between
John H. Martin, as trustee of the estate of the Im-
perial Copper Company, a corporation, bankrupt,
petitioner, by his counsel, Francis M. Hartman and
E. F. Jones; and M. P. Freeman as trustee of the es-
tate of the Southern Arizona Smelting Company, a
corporation, bankrupt, respondent, that the clerk of
the United States District Court for the District of
Arizona, at Tucson, may send up to the Circuit Court
of Appeals for the Ninth Circuit, sitting at the city
of San Francisco, State of California, certified copy
of the voluntary petition in bankruptcy filed in said
United States District Court for the District of Ari-
zona, at Tucson, by the said Southern Arizona Smelt-
ing Company, on the 29th day of September, 1914,
and also certified copy of the order of adjudication

made and entered upon said petition by said Court upon said 29th day of September, 1914; and that said certified copies of said petition in bankruptcy and order of adjudication thereon be used to supplement and be made a part of and incorporated in the record in the above-entitled matter heretofore sent up to said Circuit Court of Appeals by the clerk of said United States District Court for the District of Arizona. [5]

Dated this 29th day of November, A. D. 1915.

FRANCIS M. HARTMAN,

E. F. JONES,

Attorneys for John H. Martin, Trustee of the Estate of Imperial Copper Co., a Corporation, Bankrupt, Petitioner.

ELLINWOOD & ROSS,

SELIM M. FRANKLIN,

Attorneys for M. P. Freeman, Trustee for the Estate of Southern Arizona Smelting Company, a Corporation, Bankrupt, Respondent.

[Endorsements]: In the United States District Court for the District of Arizona. B-9 Tucson. In the Matter of the Southern Arizona Smelting Co., a Corporation, Bankrupt. John H. Martin, as Trustee of Imperial Copper Company, a Corporation, Bankrupt, Petitioner, vs. M. P. Freeman, Trustee of Southern Arizona Smelting Co., a Corporation, Bankrupt, Respondent. Stipulation. Filed Nov. 29, 1915. George W. Lewis, Clerk. [6]

[Certificate of Clerk U. S. District Court to Supplemental Transcript of Record.]

In the United States District Court for the District of Arizona.

No. B-9—TUCSON.

In the Matter of the SOUTHERN ARIZONA
SMELTING COMPANY, a Corporation,
Bankrupt,

JOHN H. MARTIN, as Trustee of the Estate of Imperial Copper Company, a Corporation, Bankrupt, Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of Southern Arizona Smelting Co., a Corporation,
Bankrupt,

Respondent.

MINUTE ENTRY MADE ON MONDAY, NOVEMBER 29th, 1915.

It is ordered that the clerk do forthwith prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a true and correct copy of the voluntary petition, order of adjudication, stipulation requiring that said petition and order of adjudication be so transmitted, on file and of record in the above-entitled case, together with copy of this order, duly certified under his hand and seal of this court. [7]

[Order Directing Transmission of Supplemental
Transcript of Record.]

*In the United States District Court for the District
of Arizona.*

United States of America,
District of Arizona,—ss.

I, George W. Lewis, clerk of the United States District Court for the District of Arizona, do hereby certify the foregoing to be a true, perfect and complete copy of the voluntary petition, order of adjudication and stipulation requiring that said petition and order of adjudication be transmitted to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the Matter of the Southern Arizona Smelting Company, a corporation, Bankrupt, No. B-9—Tucson, as the same appears from the original records of same on file in my office at Tucson, Arizona, together with order requiring same to be transmitted.

WITNESS my hand and the seal of said Court affixed hereto at Tucson, Arizona, this thirtieth day of November, in the year of our Lord, one thousand nine hundred and fifteen and of our Independence the one hundred and fortieth.

GEORGE W. LEWIS,
Clerk.

By Effie D. Botts,
Deputy. [8]

[Endorsed]: No. 2697. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. John H. Martin, as Trustee of the Estate of Imperial Copper Company, a Corporation, Bankrupt, Petitioner, vs. M. P. Freeman, as Trustee of the Estate of Southern Arizona Smelting Company, a Corporation, Bankrupt, Respondent. Supplemental Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Arizona.

Received December 4, 1915.

F. D. MONCKTON,
Clerk.

Filed December 6, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

NO. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN RE SOUTHERN ARIZONA SMELTING
COMPANY, a corporation, *Bankrupt,*
JOHN H. MARTIN, as Trustee of the Estate of
Imperial Copper Company, a corporation,
Bankrupt, *Petitioner,*
vs.

M. P. FREEMAN, as Trustee of the Estate of
Southern Arizona Smelting Company, a cor-
poration, Bankrupt, *Respondent.*

BRIEF OF PETITIONER

Filed

FEB 2 - 1916

F. D. Monckton,
Clerk.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Attorneys for Petitioner.

NO. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN RE SOUTHERN ARIZONA SMELTING
COMPANY, *Bankrupt,*

JOHN H. MARTIN, as Trustee of the Estate of
Imperial Copper Company, Bankrupt,
Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of
Southern Arizona Smelting Company, Bank-
rupt, *Respondent.*

BRIEF OF PETITIONER

STATEMENT OF THE CASE

This is a petition to revise in matter of law, brought by John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, against M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, bankrupt, to review a certain order made by the United States District Court for the District of Arizona, in the Matter of the Southern Ari-

zona Smelting Company, a corporation, bankrupt, decreeing that the lien of a certain attachment theretofore issued and levied by the Trustee in Bankruptcy of said Imperial Copper Company, bankrupt, against the property of said Southern Arizona Smelting Company, was null and void, that the property affected thereby should be deemed released therefrom, and that the said Martin, as such Trustee, be enjoined and restrained from further prosecuting such attachment proceeding.

The Imperial Copper Company was adjudged a bankrupt upon an involuntary petition, on July 25, 1911.

On August 21, 1911, M. P. Freeman was elected Trustee in Bankruptcy of said Imperial Copper Company, and acted as such trustee until on or about July 2, 1914, at which time he resigned and petitioner herein, Martin, was elected to fill the vacancy.

At the time the copper company was adjudged a bankrupt there was due it from the Southern Arizona Smelting Company, a corporation, the sum of \$28,887.71.

On January 23, 1912, said Freeman, as Trustee of the copper company, instituted an action in the then District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, against Southern Arizona Smelting Company, to recover upon said debt. Nothing was done in said action until on or about June 17, 1914, when, in obedience to an order made by the District Court upon the application of certain creditors of the copper company, the said Freeman caused an attachment to be issued in said action and the same to be levied upon the property of the smelting company.

Thereafter, on the 29th day of September, 1914, and within four months of the levying of said attachment, the Southern Arizona Smelting Company filed its *voluntary*

petition in bankruptcy in the United States District Court for the District of Arizona, was adjudicated a bankrupt on the same day, and on the 31st day of October, 1914, M. P. Freeman was elected as trustee in bankruptcy of the smelting company.

On or about March 18, 1915, the said Freeman, as Trustee in Bankruptcy of the smelting company, filed a petition in the United States District Court for the District of Arizona, in the matter of the Southern Arizona Smelting Company, a corporation, bankrupt, for an order to show cause directed against said Martin as Trustee of the Imperial Copper Company, a corporation, Bankrupt, why the said attachment lien should not be held to be null and void, and why a writ of injunction should not issue enjoining and restraining said Martin, as such trustee, from further prosecuting said attachment proceeding, alleging in said petition, among other things, that at the time of the levy of said writ of attachment the said Southern Arizona Smelting Company was and at all times since has been insolvent.

Martin, as trustee in bankruptcy of the Imperial Copper Company, appeared and filed an answer to said petition, denying that the said smelting company was insolvent at the time of the levying of said attachment, or that it was insolvent at the time of the filing of the voluntary petition in bankruptcy by the smelting company, or that it was insolvent at any time, and alleging among other things that at the time of the levying of said writ of attachment and at the time of the filing of the voluntary petition in bankruptcy, and at all times, that the smelting company was solvent, and that the aggregate of the property of the said smelting company, exclusive of any property which it may have concealed or removed, or attempted to conceal or remove with intent to delay or defraud its creditors, was and is, at a fair valuation, sufficient in amount to pay its debts.

Martin, trustee of the copper company, in his answer to said petition, also set forth and described the property of the smelting company in detail, and also set forth a list of the debts of the smelting company as shown by the schedules filed by the smelting company and further alleged that a large portion of said debts were based upon accommodation notes of the smelting company and were not legal, proper or just debts of said company, and could not be proved or allowed in the bankruptcy proceedings.

Martin, as trustee of the copper company, in his answer to said petition, prayed that the court proceed to hear said matter and take evidence with reference to the question of the insolvency of said smelting company at the time of the levy of said attachment and at the time of the filing of said petition in voluntary bankruptcy by the said smelting company.

The District Court held that Martin, as trustee for the copper company and the holder of the attachment lien, was precluded from contesting the question of insolvency by reason of the fact that the smelting company had been adjudicated a bankrupt within four months of the levy of said writ upon its voluntary petition, and that such adjudication of the smelting company upon such voluntary petition within four months of the levy of said writ of attachment was *res adjudicata* as against the holder of the attachment on the question of insolvency.

ASSIGNMENTS OF ERROR

Petitioner relies upon the following assignments of error :

1. The Court erred in holding in effect that the adjudication of bankruptcy of said smelting company upon the voluntary petition filed by it within four months of the levy of said writ of attachment dissolved or voided the attach-

ment lien, irrespective of whether or not said smelting company was solvent or insolvent at the time of the levy of said attachment or at the time of said adjudication made upon such voluntary petition.

2. The Court erred in holding that the adjudication of bankruptcy of the smelting company upon its voluntary petition was binding and conclusive upon petitioner, a creditor of said smelting company, and *res adjudicata* of petitioner's right to test the question of solvency or insolvency of the smelting company.

3. The court erred in holding that petitioner was precluded, by reason of the adjudication so made in such voluntary petition, from contesting the question of solvency or insolvency of the smelting company.

4. The Court erred in holding that the question at issue was one of law and not one of fact to be determined upon evidence, to-wit, whether or not at the time of the levy of the attachment or at the time of the adjudication the said smelting company was solvent or insolvent.

5. The Court erred in holding in effect that although the smelting company may have been solvent at the time of the levy of the attachment, or at the time of the adjudication, that the attachment lien of petitioner was nevertheless dissolved.

6. The Court erred in denying to petitioner, a creditor of said smelting company, the right to test the question as to the solvency or insolvency of said smelting company at the time of the levy of said writ of attachment or at the time of such adjudication.

ARGUMENT

We concede at the outset that if an involuntary petition had been filed against the smelting company within four

months from the time of the levy of the writ of attachment, and the attaching creditor, the trustee of the copper company had not appeared therein and resisted the same, and an adjudication made thereon, that such adjudication would have been *res adjudicata* against petitioner herein as to the insolvency of the smelting company.

The reason for this is that upon the filing of an involuntary petition in bankruptcy all creditors become parties thereto, and especially creditors who have levied attachments upon the debtor's property within four months of the filing of the petition.

But in this case the filing of the voluntary petition in bankruptcy was purely an *ex parte* matter. The petition was filed on September 29th, 1914, and on the same day the adjudication was made. The petition did not allege that the smelting company was insolvent. (Transcript of Record, pages 57-60.) It only alleges that it owed debts which it was unable to pay in full and that it was willing to surrender all of its property for the benefit of its creditors.

Loveland on Bankruptcy, 4th Ed., p. 347: (*Italics ours.*) "A solvent person may file a petition in bankruptcy if he owes debts. The court will accept petitioner's statement that he owes debts which he is unable to pay in full, and that he is willing to surrender all of his property for the benefit of his creditors, except such as is exempt by law.

Same, p. 499: The adjudication is conclusive only as to the facts directly and distinctly put in issue and the finding of which is necessary to uphold the adjudication.

Same, page 500: The adjudication is conclusive on the parties and their privies in all subsequent proceedings, where an issue was made and decided in respect to the bankrupt's residence, or as to insolvency when that ques-

tion is necessarily involved, or that the debtor was subject to be adjudged an involuntary bankrupt.

Same, page 502: The adjudication binds only as to what is *actually determined* by the judge in making the order.

Same, page 985: The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition. But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding the fact of insolvency at the date the act was committed may be taken as established by the adjudication.

Same, page 1063: The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition unless the question is adjudged in determining an act of bankruptcy in an involuntary proceeding. In that case the fact of insolvency at the date the act was committed may be deemed as established by the adjudication. The question of insolvency is one of fact to be submitted to the jury under proper instructions, when the case is tried to a jury.

Same, page 360: The judge of a court of bankruptcy regularly hears a voluntary petition and makes an adjudication or dismisses the petition. The judge opens the petition to ascertain if it is in form prescribed by the supreme court and sufficiently states facts entitling the debtor to take the benefit of the act. *These are not issuable facts. The law takes the debtor at his word.* If the petition is sufficient the adjudication is entered as a matter of course. No notice is required to creditors before making the order adjudicating the petitioner a bankrupt.

Same, page 265: The solvency or insolvency of a petitioner in voluntary bankruptcy is immaterial. A creditor cannot resist the petition on the ground that the petitioner is solvent.

Same, page 305: The adjudication of bankruptcy raises no presumption of insolvency at a previous date, unless founded upon some act of bankruptcy involving insolvency as an element. In such a case the adjudication is conclusive of insolvency at the date the act of bankruptcy was committed."

Collier on Bankruptcy, 12th Ed., page 121: "Any person who owes debts in any amount, no matter how small, may file a voluntary petition. Such filing is not an act of bankruptcy, as under the law of 1867 and the present English law, but is an *ex parte* application that gives jurisdiction to the court to decree it. A voluntary petitioner may even be solvent. There is nothing in the act which requires the person to be insolvent, and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor prove it, to procure an adjudication. A creditor may not intervene to oppose the petition.

Same, page 434: The adjudication is, like other judicial determinations, subject to the well-settled rule that matters which have been once litigated and determined by the judgment of a court cannot again be made the subject of legal contention as between the parties to such judgment and their privies. So that where the question of the bankrupt's residence, or the question of insolvency, or the amount of the petitioner's claim, were at issue, the adjudication in respect thereto is binding upon the parties and their privies in all subsequent proceedings.

Same, page 791: Whether or not a debtor is insolvent is a question of fact, and the burden of showing insolvency is on him who alleges it. The fact that a debtor is adjudged a voluntary bankrupt does not raise a presumption of insolvency prior to the filing of the petition."

In re Chappell, 113 Fed., 545: Quoting from the syllabus:

“Where the trustee of one who was adjudged a bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt’s petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answer that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency.”

The Court said in its opinion: (*Italics ours.*)

“Under a well-settled rule of pleading, in legal proceedings of all kinds, a party making an allegation of a fact necessary to sustain his case must prove the truth of the allegation; and this rule, in the absence of any statutory provision affecting it, governs the allegations made in the trustee’s petition. He must prove that the bankrupt was insolvent when he made the payments in the petition alleged. Is his contention that there is a presumption of insolvency within the four months preceding the filing of the petition by or against the bankrupt correct? Clearly in the case under consideration—that of an adjudication on a petition filed *by*, and not *against*, the bankrupt—there is no such presumption.”

Jackson vs. Valley Tie & Lumber Co., 108 Va., 714; 62 S. E., 964. (Circuit Court of Appeals of Virginia, Nov. 19, 1908.) (Syllabus.)

“2. BANKRUPTCY — DISTRIBUTION OF ESTATE — ACTIONS — EVIDENCE — ATTACHMENT—LIEN. Under Bankruptcy Act, July 1, 1898, c. 541, sec. 67f, 30 Stat. 565, (U. S. Comp. St.

1901, p. 3450), providing that all attachments or other liens against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him are void in case he is adjudged a bankrupt, the debtor must not only be insolvent, but the insolvency must have existed at the time the lien attached.

“3. Under Bankruptcy Act, July 1, 1898, c. 541, par. 67f, 30 Stat. 565, (U. S. Comp. St. 1901, p. 3450), making void liens created against a bankrupt within four months prior to the filing of the petition, the burden of proving insolvency at the time the lien was created is on the one asserting it.”

In this case the attachment was levied on September 13, 1906. On November 5, 1906, and within four months, the defendant Girard was adjudged a bankrupt on his voluntary petition. On February 19, 1907, E. H. Jackson filed a petition in the attachment suit, setting forth the adjudication of Girard as a bankrupt, the appointment of petitioner as trustee; that the plaintiff in this suit had attached a fund of about \$567.37 owing to the estate of Girard by the defendant the Valley Tie & Lumber Company; and that “inasmuch as the said Girard is now a bankrupt, and as your petitioner has been appointed by the creditors of said bankrupt estate, to take charge of all the assets of said estate he has a right to require the said Valley Tie & Lumber Company to pay over to him the said sum of \$567.37,” and also filed a motion in writing to abate the attachment. The trustee by his attorney gave as the grounds for his motion to abate that Girard had been adjudged a bankrupt within four months after said attachment was executed, and that accordingly the said attachment and the levy thereof were null and void, under and by reason of the provisions of the Bankrupt Act, and especially Section 67f.

The Supreme Court of Appeals of the State of Virginia overruled the motion to abate on the ground that there was

no evidence or proof in the case that said Girard at the time of the obtaining of the attachment and the levy thereof as shown by the record, was insolvent. The Trustee in Bankruptcy in his appeal to the Supreme Court of Appeals of Virginia, assigned, as error, among other things, the refusal of the court to abate the attachment upon appellant's original petition filed in the case. The court in passing upon the question uses the following language:

"Section 67f of the bankruptcy act, so far as material here, is as follows: 'That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same.'

"The essential to the invalidity of any lien falling within the purview and control of the statute is that (a) the lienee must be insolvent; (b) the insolvency must have existed at the time the lien attached, or, as applied to this case, Girard must have been insolvent on September 13, 1906, the date of the levy of the attachment."

Loveland on Bankruptcy (3rd Ed.), Sec. 192c, discussing paragraph 67f of the bankruptcy act, says: "It is essential, to bring a case within the prohibition, that it appear that the lien was obtained against a person who was insolvent at the time. If it does not so appear, the lien is valid. It is not sufficient that the levy caused insolvency." See also 1 Remington on Bankruptcy, Sec. 1460.

In *Simpson vs. Van Etten* (C. C.), 108 Fed., 199, the opinion of the court quotes with approval from Collier's work on Bankruptcy (3rd Ed., p. 434), as follows: "Not all liens obtained against one afterwards and within four months adjudged bankrupt are deem-

ed null and void. It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created."

"The burden of proof of such insolvency as is meant in paragraph 67f is held in *Re Chappell* (D. C.), 113 Fed., 454, to be upon the party alleging it as ground for abatement. The syllabus in that case is as follows: 'Where the trustee of one who was adjudicated a bankrupt on his voluntary petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answered that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency.'

"In the case at bar appellant, neither in his petition filed in the lower court, nor in any statement of his grounds of motion to abate the attachment, relied upon Girard's insolvency within four months previous to his being adjudicated bankrupt, but relied solely on the ground that Girard had been adjudicated bankrupt within four months after the attachment in this case was executed, and that accordingly the attachment and the levy thereof were null and void under and by reason of the provisions of the bankruptcy act, and especially paragraph 67f thereof. So that, al-

though counsel for appellant was called upon to state in writing the grounds of his motion to abate the attachment, and was advised that the grounds of resistance of that motion were that no evidence had been adduced by the appellant, or any person, showing or tending to show that Girrard was insolvent at the date of the levy, and the obtaining of the attachment sought to be abated, he declined to furnish any evidence as to insolvency, and agreed that the court should take the case for decision upon the record as it then stood and the authorities cited by counsel. Under these conditions, the judgment of the court overruling the motion to abate the attachment was plainly right.” ,

Stone Ordean Wells Company, a corporation, petitioner, vs. John H. Mark, Trustee of Wadena Cracker Company, a corporation, Bankrupt, respondent (C. C. A. 8th Cir.), Sept., 1915, 35 Am. Bank. Repts., 663; 277 Fed. 227.

Statement of facts by the Court:

“On April 24, 1913, Stone Ordean Wells Company, a corporation, obtained a judgment for \$197.83 against Wadena Cracker Company, another corporation, in one of the district courts of the State of Minnesota, on April 26, 1913, an execution was issued thereon; on May 15, 1913, the sheriff levied this execution on a debt owing by the First National Bank of Wadena to the Cracker Company on account of moneys that had theretofore been deposited with it by the Cracker Company. The statutes of Minnesota provide that such a levy may be made by leaving with the debtor to the judgment debtor ‘a certified copy of the execution with a notice specifying the property levied on’ (Statutes of Minnesota, 1913, sec. 7934), and that when the officer with an execution against the defendant applies to any person mentioned in section 7934 for the purpose of levying upon a debt he owes to the defendant that person shall furnish the officer with a certificate of the debt owing to the judgment debtor. Section 7935. The bank disclosed to the sheriff its indebtedness to the Cracker Company in an amount in excess of the

judgment debt and on June 15, 1913, he collected from it by virtue of his levy \$211.93, retained \$10.70 in payment of his fees and costs and paid over to the Stone Company \$201.23. On May 23, 1913, a creditors' petition against the cracker company praying its adjudication as a bankrupt was filed in the court below; on June 14, 1913, the Cracker Company was adjudged a bankrupt on default; on July 23, 1913, John H. Mark became trustee of its estate and on the same day he presented to that court a petition for an order on the Stone Company to pay over to him as such trustee the \$211.93 the sheriff had collected from the bank. The Court issued an order on the Stone Company to show cause why the prayer of the trustee's petition should not be granted. The Stone Company objected to the granting thereof on the ground that the petition failed to present any case wherein the court had jurisdiction to determine in a summary proceeding any issue it tendered. The court below, however, after a hearing, granted the petition and ordered the Stone Company to pay to the trustee \$211.93, interest thereon from June 16, 1913, and \$15.00 costs on the hearing. The Stone Company has brought this petition to revise the final order below on the ground that there was no allegation in the petition for the order and no proof of the insolvency of the Cracker Company at the time of the levy and that in the absence of such allegation the bankruptcy court was without jurisdiction to avoid, in a summary proceeding, its levy and compel its repayment of the money it collected by means of the process of the state court to the trustee."

"Sanborn, Circuit Judge.

"Section 67f of the Bankruptcy Act provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same.

. . . . And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." Act of July 1, 1898, c. 541, sec. 67f; as amended Feb. 5, 1903, c. 487, sec. 16, and June 25, 1910, c. 412, sec. 12, U. S. Comp. Stat. 1913, Sec. 9651, pages 4399, 4401.

"Counsel for the trustee cite this section and decisions under which orders made thereunder in summary proceedings avoiding liens obtained against insolvents in legal proceedings within four months of the filing of petitions in bankruptcy against them have been sustained. But the insolvency of the persons against whom the liens mentioned in this section are obtained is indispensable to their avoidance by summary proceedings thereunder. It is liens obtained through legal proceedings against an insolvent, and those only, that are avoided in case he is adjudged a bankrupt, and it is conveyances necessary to effect an avoidance of such liens and those only that the court of bankruptcy is empowered by this section to order. If a creditor by legal proceedings obtains a lien by attachment or by the levy of an execution three months before the filing of a petition in bankruptcy against his debtor who is then solvent and who does not become insolvent until the day the petition in bankruptcy is filed against him, that creditor does not obtain his lien "through legal proceedings against a person who is insolvent," but against a person who is solvent "within four months prior to the filing of the petition in bankruptcy against him," and section 67f grants the court of bankruptcy no power to avoid that lien or to order conveyances to effect that result in summary proceedings. The evident purpose of the Congress in limiting the power of the court summarily to avoid liens of the character mentioned in the section to those against insolvents and in withholding power to avoid those against solvents was to give the power to avoid such as creditors would be likely to know would probably give them a preference over other creditors, and to withhold the

power to avoid others. The natural and pertinent time of that insolvency which conditions the power of the court of bankruptcy to avoid in summary proceedings one of the liens specified in section 67f is the time when the lien is obtained. If the person is then insolvent the lien is obtained against "a person who is insolvent", if he is solvent then the lien is obtained against a person who is solvent. And the terms of the statute, their natural and rational interpretation, the meaning which first occurs to the mind on reading them and that which after meditation securely abides compel the conclusion that it was the intention of Congress and the legal effect of section 67f to grant to the courts in bankruptcy the power to effect an avoidance in summary proceedings of liens of the character there specified obtained against persons who were insolvent at the respective times the liens were obtained and those only, and that the insolvency of the person at the time the lien is acquired is an indispensable condition of the existence and of the exercise of the power. *Keystone Brewing Co. vs. Schermer*, 31 Am. B. R., 279, 281, 282; 88 Atl., 657; *Simpson vs. Van Etten* (C. C. Pa.), 6 Am. B. R., 204, 205, 206; 108 Fed., 199, 201; 1 *Loveland on Bankruptcy*, 909, 910, Sec. 437; *Severin vs. Robinson*, 27 Ind. App., 55; 60 N. E., 966; *Collier on Bankruptcy*, (10th Ed.), p. 963, par. e."

Counsel for respondent relied in the court below upon the case of *Cook vs. Robinson*, etc., decided by this court, March 18, 1912; 194 Fed., 785; in which this court held, and correctly, that the adjudication of bankruptcy in that particular case was binding and conclusive upon the attaching creditor; but in that case the involuntary petition filed against the debtor was predicated and based upon the attachment levied by Cook.

We quote from that decision as follows: (*Italics ours.*)

"That plaintiff in error is himself a creditor of Robinson, and it was by reason of that relationship that he was enabled to obtain an attachment against the

bankrupt's property. It is provided by the Bankruptcy Act that the bankrupt or any creditor may appear and plead to the petition (for involuntary bankruptcy) within five days after the return day, or within such further time as the court may allow. If neither the bankrupt nor any of his creditors shall so appear and controvert the facts alleged in the petition, then the judge is empowered and directed to determine as soon as may be the issues presented by the pleadings, unless for the question of insolvency or any act of bankruptcy alleged in the petition a jury is demanded. If on the last day within which pleadings may be filed, *none are filed*, the judge is authorized on the next day to make the adjudication.

"With these statutes (Pars. 67c and 67f Bankruptcy Act) in view, let us examine the petition filed for having Robinson adjudicated a bankrupt. The amended petition was filed on September 10, 1910; the original having been filed August 27th previous. The adjudication was made September 16, 1910. Among other things it sets out that Robinson is insolvent and unable to pay his debts; that within four months prior to the filing of the petition Robinson committed an act of bankruptcy, consisting in the institution by Cook of the action to recover for an indebtedness of \$10,000 and interest owing by Robinson to Cook, and the levy of the attachment on July 18, 1910, and August 4, 1910, upon the property of Robinson, and the securing of an injunction by Cook against Robinson restraining the latter from disposing of any of his property, it being alleged in connection therewith that, unless Robinson is adjudicated a bankrupt, Cook will secure a preference over and above all the other creditors whose claims are equal in rank and ahead of those creditors having preferred claims, some of the claims of the latter class being set out.

"So that the petition presents two cardinal issues: *Robertson's insolvency*, and the commission of an act of bankruptcy. Upon consideration of these he was adjudged a bankrupt.

"But, however this may be, the allegation of Robinson's insolvency was essential in view of the attachments pending against his property. It must be further premised that the controversy inaugurated under the present action is wholly collateral to the proceeding in which Robinson was adjudged a bankrupt.

"Being parties to the bankruptcy proceeding, it must follow that the creditors are precluded by the adjudication upon such issues as must necessarily be determined in order to pass judgment.

"In the case at bar, as we have seen, two of the essentials to be determined in the course of the adjudication were the insolvency of the debtor, and the admission in writing of his inability to pay his debts and his willingness to be adjudicated a bankrupt on that ground, and this within four months previous to the filing of the petition. So that the plaintiff in error is precluded by the adjudication to question the insolvency of Robinson at the time of the filing of the petition in bankruptcy, and it does not affect the case that Robinson may not have been insolvent at the time the attachments of Cook were levied. This for the reason that by subdivision 'f' of section 67 all attachments levied against a person insolvent at any time within four months prior to the filing of the petition in bankruptcy are deemed null and void, in case the adjudication in bankruptcy is made. The attachment is annulled by force of the adjudication, and the trustee becomes entitled to the property free of the lien or incumbrance thereof."

In this case this Honorable Court held that Subdivision "c" of Section 67, was repugnant to the provisions of Subdivision "f", Section 67, and that Subdivision "f" must control.

Subdivision "c", Section 67, provides that : (*Italics ours.*)

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an

attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy *by or against* such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefitted thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

Subdivision "f" provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy *against* him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or im-

pair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It will be noted that Subdivision "f" only refers to liens obtained against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy *against* him, while Subdivision "c" refers to liens obtained within four months before the filing of a petition in bankruptcy *by* or *against* such person.

The property of the smelting company consists of seven hundred and twenty acres of land (Transcript of Record, pages 21-22), and a large up-to-date smelting plant, which plant cost in excess of the sum of six hundred thousand dollars (Transcript of Record, page 18).

A detailed description of the smelting plant, machinery and equipment is contained in the record (Transcript of Record, pages 29-36).

A list of the debts is also contained in the record (Transcript of Record, pages 23-24).

The total debts as scheduled by the smelting company amounted to \$144,404.72, but a portion of this alleged indebtedness, to-wit, the sum of \$64,841.82 (Transcript of Record, page 24), is based upon notes which the smelting company executed as accommodation endorser and for which it received no consideration and no benefit (Transcript of Record, page 25).

This reduces the bona fide, just and valid debts of the smelting company to the sum of \$79,562.90 (Transcript of Record, page 23).

We feel very confident that we will be able to prove, if permitted to do so, even though the burden of proof be cast upon us, that at the time the attachment was levied, and at

the time of filing of the voluntary petition in bankruptcy by the smelting company, and at all times, the concern was perfectly solvent, and that the aggregate of its property, exclusive of any property which it may have transferred, concealed or removed, or attempted to transfer, conceal or remove with intent to defraud, hinder or delay its creditors, was and is, at a fair valuation thereof, sufficient in amount to pay its debts.

We are contending, however, that in this case the burden of proving insolvency is upon the Trustee in Bankruptcy of the smelting company, as that is one of the material allegations of his petition filed in the District Court in his application for an order directed against the Trustee of the Copper Company, to show cause why the attachment should not be vacated.

We most earnestly insist that the order of the District Court brought up for review should be reversed, and that the Trustee in Bankruptcy of the smelting company should be required to prove that the smelting company was insolvent at the time of the levy of the attachment, and at the time of filing of the voluntary petition in bankruptcy by that company, as alleged.

Respectfully submitted,

FRANCIS M. HARTMAN,

EDWIN F. JONES,

Attorneys for Petitioner.

No. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN RE SOUTHERN ARIZONA SMELTING
COMPANY, a corporation, *Bankrupt,*
JOHN H. MARTIN, as Trustee of the Estate of
Imprial Copper Company, a corporation, Bank-
rupt, *Petitioner,*
vs.

M. P. FREEMAN, as Trustee of the Estate of
Southern Arizona Smelting Company, a cor-
poration, Bankrupt, *Respondent.*

BRIEF FOR RESPONDENT

ELLENWOOD & ROSS,
SELEM M. FRANKLIN,
Attorneys for Respondent.

IN THE

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FOR THE NINTH CIRCUIT

IN RE SOUTHERN ARIZONA SMELTING
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Southern Arizona Smelting Company, a cor-
poration, Bankrupt, *Respondent.*

No. 2697

BRIEF FOR RESPONDENT

ELLENWOOD & ROSS,
SELEM M. FRANKLIN,
Attorneys for Respondent.

The only question involved in this appeal is whether or not a writ of attachment levied on property of the bankrupt within four months from the filing of an voluntary petition and the adjudication thereon, is made void by the Bankruptcy Act.

In the case of *First National Bank vs. Staake*, 202 U. S. 141-149, the court said :

“To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition”.

First Nat. Bank vs. Staake, 202 U. S. 141-149, 50 L. Ed. 969-70.

Prior to the rendition of this decision the Circuit Court of Appeals, 2nd District, by *Lacombe in re Kenney*, 105 Fed. 897, 45 C. C. A., 113, in construing 67f, said :

“There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors, as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition; and apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provision that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void, and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive.”

In *re Federal Biscuit Co.*, 214 Fed. (2nd C. C. A.) 221 226, the court, in construing Sec. 67f of the Bankruptcy Act, said :

“A lien acquired by an attachment of an insolvent debtor is a lien ‘obtained through legal proceedings’ and is, by the express terms of the Bankruptcy Act, par. 67f, dissolved by the filing of a petition in bankruptcy by or against the debtor, if that occurs within

four months after its date. And the effect of the statute in dissolving attachments is not confined to those issuing from courts of the United States, but applies as well to the process of the state courts."

In *re Forbes*, 108 C. C. A. 191, 186 Fed. 79-93, this Honorable court said:

"But the provision of section 67f is not limited in the annulment of liens to property that passes to the trustee. It is general and sweeping, and applies to liens acquired through legal proceedings against the bankrupt during the four months period prior to his filing his petition in bankruptcy. Collier on Bankruptcy (8th Ed.) p. 161. There is some conflict in the authorities upon this question, but we think the interpretation placed upon the statute by Judge Jones in the case of *in re Tune* (D. C.) 115 Fed. 906, is correct."

The decision of Judge Jones, above referred to, is quoted and made part of the decision of the Circuit Court of Appeals itself. In this decision, amongst other things, is the following:

"The main reason for the four-months provision was to prevent the race by creditors to seize the estate of an insolvent when it is found that he is in failing circumstances, and to prevent the preferences which would follow if liens and attachments were allowed during that period."

In the case of *Cook vs. Robinson*, the lower court made an order vacating the attachment obtained within four months prior to the filing of the petition in bankruptcy.

The question was squarely presented to the court, whether or not under section 67f of the Bankruptcy Act, proof had to be made of the insolvency of the debtor on the day the attachment was levied, or whether the fact that he was declared insolvent, of itself vacated the writ of attachment levied within four months from the filing of the petition.

The court held that whether the debtor was insolvent or not at the time the attachment was levied was utterly immaterial; that the insolvency of the debtor having been established by the adjudication of bankruptcy, the lien of attachment obtained during the four months, was vacated and whether the debtor was insolvent on the day the attachment was levied, was utterly immaterial.

The court said :

“So that the plaintiff in error is precluded by the adjudication to question the insolvency of Robinson at the time of the filing of the petition in bankruptcy, and it does not affect the case that Robinson may not have been insolvent at the time the attachments of Cook were levied. This for the reason that by subdivision ‘f’ of Section 67 all attachments levied against a person insolvent at any time within four months prior to the filing of the petition in bankruptcy, are deemed null and void in case the adjudication in bankruptcy is made. The attachment is annulled by force of the adjudication and the trustee becomes entitled to the property free of the lien or encumbrances thereof.”

The court cites with approval the case of *Bear vs. Chase*, 40 C. C. A. 182, 99 Fed. 920-927. In the case of *Bear vs. Chase*, section 67f is fully considered, and in regard thereto that court, amongst other things, said :

“This section is broad and comprehensive in its terms and too clear to admit of serious controversy. Under it no preference can be acquired by the levy of attachments within four months of the filing of a petition in bankruptcy. . . . In the case of *Re Kennedy*, supra, also previously reported in 95 Fed. 427, Judge Brown of the District Court of the southern District of New York, a judge of great learning and ability, fully considered this question, and in each decision held that liens acquired within four months of the filing of a petition in bankruptcy were annulled by

the subsequent adjudication of the bankrupt. To the same effect are the decisions of several other of the District Courts. In *re Reichman*, 91 Fed. 624; In *re Fellerath*, 95 Fed. 121; In *re Rome Planing Mill*, 96 Fed. 812; In *re Vaughan*, 97 Fed. 560; In *re Higgins*, Id. 775; In *re Burrus*, Id. 926.

This section has also been construed recently by the Circuit Court of Appeals, for the 7th Circuit (In *re Richards*, 37 C. C. A. 634, 96 Fed. 935) and there the lien was declared to become null and void by the subsequent adjudication of bankruptcy. In this decision, delivered by Jenkins, Circuit Judge, it is said, in discussing the apparent inconsistency between sub-division "c" and "f" of Section 67 of the bankruptcy law:

'But sub-division "f" is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition.' "

The court in the case of *Bear vs. Chase*, further said:

"The power of the United States District Court to enjoin and restrain the parties from the further prosecution of the suits in the state court was plenary, and should have been exercised because necessary to the maintenance of its jurisdiction and the due administration of the bankrupt law." (Citing many authorities.)

The Circuit Court of Appeals for the Ninth Circuit again, in the case of *Folger vs. Putnam*, 194 Fed. 793, 114 C. C. A. 513, says:

"Section 67f provides that levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time

within four months prior to the filing of the petition in bankruptcy, shall be null and void in case he is adjudged a bankrupt, and that the property vacated thereby shall be wholly discharged and released from the same. It has been held and determined that subdivision "c" is repugnant to the provisions of subdivision "f" on the same subject, and that the latter provisions are controlling."

We therefore submit that it was immaterial whether the Southern Arizona Smelting Company, Bankrupt, was insolvent or not, as the attachment was levied within four months prior to the adjudication of bankruptcy.

Respectfully submitted,

ELLENWOOD & ROSS,

SELEM M. FRANKLIN,

Attorneys for Respondent.

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NO. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF SOUTHERN ARIZONA
SMELTING COMPANY, a corporation,

Bankrupt,

JOHN H. MARTIN, as Trustee of the estate of
IMPERIAL COPPER COMPANY, a corpo-
ration, Bankrupt,

Petitioner,

vs.

M. P. FREEMAN, as Trustee of the Estate of
SOUTHERN ARIZONA SMELTING COM-
PANY, a corporation, Bankrupt,

Respondent.

APPLICATION FOR REHEARING

FRANCIS M. HARTMAN,
EDWIN F. JONES,

Attorneys for Petitioner.

NO. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF SOUTHERN ARIZONA
SMELTING COMPANY, a corporation,

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PANY, a corporation, Bankrupt,

Respondent.

Having carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to petitioner on the grounds that:

The opinion of the Court is bottomed on the idea that by bankruptcy, either voluntary or involuntary, the entire estate of the bankrupt is devoted to the payment of his debts, and that all liens which exist against the property of the bankrupt, acquired within four months of the adjudication are *ex vi termini* denounced and destroyed by the Bankrupt Act.

Let it be admitted that "a person against whom a peti-

tion has been filed shall include a person who has filed a voluntary petition" and that therefore the petitioner would not be entitled to any greater consideration than would be awarded him against an involuntary bankrupt, and that a creditor of the Smelting Company would have no rights which a creditor would not have if that company had been forced into bankruptcy by its creditors.

The fundamental contention of petitioner is that it is necessary for the person (whether a voluntary or involuntary bankrupt) to be *insolvent* at the time the lien attaches before the bankrupt act denounces and destroys such lien.

Sec. 67c would seem to lean to this view for it declares that a lien created by or obtained in a suit, etc., shall be dissolved by the adjudication of (1) "it appears that the lien was obtained and permitted while the defendant *was insolvent* and that its existence and enforcement will work a preference."

Sec. 67f is as follows: That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt.

The case of *Stone Ordean Wells Co. vs. Mark*, 227 Fed. 975, and which was cited in our brief, is a clear cut decision that the insolvency must be both alleged and proved by the person who claims the lien is void. This Court does not in terms dissent from its reasoning. It applies the rule in *Cook v. Robinson* as showing why a different conclusion is reached. Let us then consider the reasoning on which that case is founded, and the reasons given for the conclusions reached.

This Court in that case used this language, in stating the issues:

“So the petitioner presents two *cardinal issues* * * * *Robertson’s insolvency* and the *commission of an act of bankruptcy*. Upon consideration of these he was adjudged a bankrupt. (Italics ours.)

It does not require argument to show that both of these issues may be litigated and have evidence pro and con produced to sustain or controvert them. It is provided by the Bankrupt Act that *any creditor may appear and plead* to the petition within five days after the return day.

It is clearly shown that the Act with care gives to the holder of a lien the right to appear and litigate the question whether or not the facts which Congress had declared shall destroy his lien, exist in any case of an involuntary petition, and it is on this ground that the Court proceeds to hold them bound by the adjudication, for it proceeds:

Creditors of a bankrupt *are parties* to the proceedings to have him so adjudged, and are precluded by the adjudication in so far at least *as it determines the debtor’s insolvency* and that he has committed an act of bankruptcy within four months prior to the filing of the petition and Judge Wolverton in his opinion, after stating the position thus taken, says:

“Being parties to the bankruptcy proceedings it must follow that the creditors are precluded by the adjudication *upon such issues as must necessarily be determined in order to pass Judgment.*”

In that case it is not decided that persons not parties are bound, but it is based on the idea that the attaching creditor, by showing that the person against whom the petition was filed was solvent, could have defeated the adjudication and preserved his lien. The creditor did not resist adjudication in that case. If the law thus preserves to the attaching creditor in an involuntary proceeding the tribunal and the right to invoke that tribunal and litigate to protect his rights, why should the creditor of a voluntary bankrupt not have opportunity and standing in the

bankrupt court to litigae the facts on the existence of which Congress has declared his lien to be destroyed?

There can be no doubt that a creditor is not and cannot be a party to a voluntary proceeding until after adjudication and that he can not resist the adjudication by plea and proof that the debtor was really able to pay his debts. This proposition is fully decided in the case *In re Fowler*, 1 Lowell, 161, cited by the Court. An examination of that case shows that the ground ruled on there was that the debtor had concealed assets, and this was met by the decision that the assignor could recover them. No lien of any kind was claimed or asserted.

The case of *Hanover Natl. Bank v. Moyses*, 186 U. S. 181, decides but a single question and that is that a voluntary bankruptcy under the Act of 1898 is constitutional. It admitted that "the extent to which liens obtained by prior judicial proceedings should be recognized was a matter wholly within the discretion of Congress," but it is insisted that Congress has only avoided liens against persons who *were insolvent* at the time the lien was acquired and that there must be a tribunal and a proceeding in which the person claiming the lien can litigate the existence or non existence of the facts on which Congress has declared his lien annulled.

The Court here uses this language :

"We think there should be none (distinction between voluntary and involuntary proceedings) when it is kept in mind that it was the intention of Congress to prevent creditors of a bankrupt from obtaining preferences over other creditors through legal proceedings had within four months prior to the filing of the petition."

The Court states that the intention of Congress was to "prevent creditors of a bankrupt from gaining preferences over other creditors through legal proceedings had within four months prior to the filing of the petition" and

cites the language used in *In re Kenney*, 105 Fed. 897, holding "that the property of the bankrupt is safeguarded against all such proceedings."

The evil then against which Congress was legislating was the creation of preferences through legal proceeding and there must be some place and time when the party claiming a lien may have the opportunity to show that the enforcement of his lien will not have such effect, even if it be held that the burden is not on the party assailing the lien, as decided in *Stone Ordean Wells Co. vs. Mark*, 227 Fed. 975.

If no injury can come to any creditor by the enforcement of the lien, and sufficient property remains in the hands of the voluntary bankrupt or his trustee, on what principle of law or logic, and by what rule of equity or fairness should the lien holder be deprived of his legal remedies for the enforcement of his debt and compelled to await the complete distribution of the bankrupt's estate, simply because the debtor is willing to have his property distributed by the bankrupt court, and have the surplus returned to him after his debts are paid?

It is earnestly insisted that the Bankrupt Act denounces and destroys only liens which inevitably and clearly under the facts of each case work a preference in favor of the lien holder to the damage of another creditor and that no debtor may halt his creditor in the use of lawful means to collect his debt because he is willing that a trustee in bankruptcy should administer his property till his debts are paid, and that no step taken by the debtor to which the lien holder may not be made a party and litigate his rights can conclude the lien holder or stamp his lien as void and of no effect.

It would be difficult to see how a preference could be obtained against a person who is solvent and who can be forced by appropriate legal process outside of bankruptcy

to pay all of his debts including the debt on which the attachment is founded, by the enforcement of the attachment, and appropriate legal remedies as to other debts, and unless such results will follow from the attachment it cannot injure the other creditors. In each of the cases cited by the Court it is clear that such results would follow.

In *re Kenney* shows a levy and sale of the entire estate, and an application of the proceeds to the claim of the attaching creditor, leaving nothing for the others. The case of *Metcalf vs. Barker*, 187 U. S. 165, clearly shows that the bankrupt was insolvent at the time and for eighteen months before the petition in bankruptcy was filed.

The case of *In re Vaughan*, 97 Fed. 560, uses this language: "The preference acquired by the creditor if the levy is not set aside, and its consequent injury to other creditors and its subversion *pro tanto* of the manifest intent and policy of the Bankruptcy Act, are in both cases precisely the same." The inevitable inference is that in that case the facts showed a resulting preference. The logic in that case could have no application to the estate of a "solvent bankrupt" filing a voluntary petition.

The case of *In re Ricards*, 96 Fed. 935, also clearly shows that in that case the insolvency of the bankrupt existed at the time the lien was acquired.

Every case, therefore, cited in the opinion is founded on facts showing insolvency at the time the lien was acquired, or that the question of insolvency could have been litigated by the attaching creditor and had not been challenged.

It is earnestly insisted that the attaching creditor cannot be deprived of his lien unless the bankrupt was insolvent at the time it was acquired, and that, having the privilege to litigate that fact in involuntary proceedings and being denied it in voluntary proceedings, a broad line of distinction is furnished for the difference in the effect of an adjudication in the two classes of case.

If proof of solvency would have defeated an involuntary adjudication and preserved the lien, why should not that right be saved to the attaching creditor in a voluntary case.

Counsel request that the Court re-examine the authorities cited in our brief on file, especially the reasoning in *Jackson vs. Valley Tie & Lumber Co.*, 108 Va. 714, where the exact question here presented is fully discussed and passed on.

Wherefore, upon the foregoing grounds, this petitioner respectfully prays this Honorable Court to grant him a rehearing of said cause.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Attorneys for Petitioner.

I, Edwin F. Jones, one of the attorneys for petitioner herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well-founded and that the same is not interposed for delay.

Edwin F Jones

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

OWE SAM GOON,
Appellee.

In the Matter of OWE SAM GOON on Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

JAN 28 1916

F. D. Mouckton,

Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

OWE SAM GOON,
Appellee.

In the Matter of OWE SAM GOON on Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*United States of America, District Court of the
United States, Northern District of California.*

CLERK'S OFFICE.

No. —.

SAMUEL W. BACKUS

vs.

OWE SAM GOON.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please make copies of the following papers
to be used in preparing transcript on appeal:

Petition for Writ.

Order to Show Cause.

Demurrer.

Order Overruling Demurrer.

Writ of Habeas Corpus.

Return of Writ.

Traverse to Return.

Order of Discharge.

Petition for Appeal.

Assignment of Errors.

Notice of Appeal.

Order Allowing Appeal.

Two Exhibits.

WALTER E. HETTMAN,

Asst. U. S. Attorney,

Attorney for Appellant.

[Endorsed]: Filed Jun. 16, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and for
the Northern District of California.*

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Petition for Writ of Habeas Corpus.

To the Above-entitled Court and to the Honorable
Judges thereof;

Your petitioner, OW SEONG, respectfully shows:

That the above-named OWE SAM GOON, is a
native of China and member of the Chinese race;

That he emmigrated from China and landed in the
United States forty-two years ago;

That he was registered as a Chinese laborer under
and by virtue of the act of Congress enacted May 5th,
1892, section 6 thereof, as amended by section 1, of
the act of Congress, enacted November 3, 1893, en-
titled "An act to prohibit the coming of Chinese per-
sons to the United States";

That pursuant to said registration said Owe Sam
Goon was given a certificate of residence entitling
him to remain in the United States; that ever since
the time of said arrival and registration he has con-
tinuously and is now maintaining a regular residence
and domicile within the borders of the United States;

That said Owe Sam Goon is unlawfully imprisoned,
detained, confined and restrained of his liberty by
Samuel W. Backus, as Commissioner of Immigra-
tion at *the of* San Francisco, at the Immigration
Station on Angel Island, Bay of San Francisco, State
of California, and within the jurisdiction of this
Court;

That said imprisonment, detention, confinement, and [2] restraint of his liberty is illegal and the illegality thereof consists in this:

That in the month of July, 1914, said Owe Sam Goon was arrested by the Immigration Inspector in and for the district of Arizona, as agent of the United States, notwithstanding said Owe Sam Goon presented to said Inspector a certificate fixing his status as a domiciled Chinese laborer; that thereafter the Secretary of Labor issued a warrant in which it was ordered that said Owe Sam Goon be deported to China, copy of said warrant is not attached hereto because it is impossible to secure a copy of said warrant of deportation.

That prior to the issuance of said warrant of deportation the said Owe San Goon has been, and now is, by the said Commissioner of Immigration and all persons before whom the matter has been considered, refused and denied a fair hearing in good faith, such as is guaranteed by law; and said warrant of deportation was issued by and through a manifest abuse of the discretion committed to each or any, or all of said persons, and through errors and mistakes of law; and in this behalf your petitioner alleges:

That said action on the part of said Immigration officials was a violation of section 12 of the act of May 6, 1882, as amended and added to by the act of July 5, 1884, of the laws relating to the admission of Chinese, which provides that "And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United

States, after being brought before some Justice, Judge, or Commissioner of a court of the United States.”

That said Owe Sam Goon was not so brought before any Justice, Judge, or Commissioner of a court, nor given a fair or proper, or any hearing as provided by law; [3]

That said Owe Sam Goon and your petitioner have exhausted all their rights and remedies before the Department of Labor; that said warrant of deportation is final as the judgment of the said Department of Labor; and that there is no appeal therefrom provided by law; unless a writ of habeas corpus issues out of this Honorable Court directed to said Commissioner of Immigration aforesaid, to whom said warrant of deportation is directed, the said Owe Sam Goon will forthwith be deported from the United States to China;

That there is no evidence of any kind, and that no evidence of any kind was provided to support the charge or charges against said Owe Sam Goon, and that all the evidence offered by Owe Sam Goon was cast aside and disregarded and not considered by any of the persons above referred to, and that the certificate and the designation of the statuts of Owe Sam Goon as issued and published by the United States Government were treated as nullities and of no effect or validity;

That Owe Sam Goon was and is ordered deported without due process of law or proof of any kind or character, tending to prove or proving the alleged charge or charges wrongfully and illegally brought against him;

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court directed to and commanding the said Samuel W. Backus, Commissioner of Immigration, at the Port of San Francisco, to have and produce the body of the said Owe Sam Goon before this Honorable Court at its courtroom in the city and county of San Francisco, State of California, at the opening of the court on a day certain in order that the alleged cause of imprisonment, detention, confinement and restraint of the said Owe Sam Goon and the legality or illegality thereof may be inquired into and in order that, in case the said [4] imprisonment, detention, confinement and restraint are unlawful and illegal, that the said Owe Sam Goon be discharged from all custody, detention, imprisonment, confinement and restraint.

Dated this 27th day of March, 1915.

JOSEPH P. FALLON,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Ow Seong, upon being duly sworn, deposes and says:

That he is the petitioner in the foregoing petition; that he has read the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes them to be true.

(Chinese Characters) (OW SEONG).

Subscribed and sworn to before me this 27th day of March, 1915.

[Seal]

HARRY L. HORN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 27, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [5]

*In the District Court of the United States, in and for
the Northern District of California.*

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Order to Show Cause.

Upon reading and filing the verified petition of Owe Seong, praying for the issuance of the writ of habeas corpus, and good cause appearing therefor.

IT IS HEREBY ORDERED that Samnel W. Backus, as Commissioner of Immigration at the Port of San Francisco, at Angel Island, be and appear before the above-entitled court, Department Number One thereof, on Saturday, the 3d day of March, 1915, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock of said day, and

IT IS FURTHER ORDERED that said Owe Sam Goon be not removed from the jurisdiction of this Court until the further order of this Court, and

IT IS FURTHER ORDERED that a copy of this order be served upon said Samuel W. Backus or such other person having said Owe Sam Goon in custody

as an officer of said Samuel W. Backus.

Dated March 27, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 27, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [6]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Samuel W. Backus,
Commissioner of Immigration at the Port of San
Francisco, and demurs to the petition on file herein
on the following grounds:

I.

That said petition does not state facts sufficient to
entitle petitioner to the issuance of a writ of habeas
corpus or any relief thereon.

II.

That said petition is insufficient in that the state-
ments in the petition relative to the record of the
testimony taken on the hearing for the order of de-
portation of the applicant, *Oew Sam Goon*, are state-
ments of conclusions of law.

III.

That there was not attached to the copy of the pe-
tition for a writ of habeas corpus which has been
served upon the said respondent, a copy of the record

of the proceedings and testimony taken at the hearing of said applicant before the Immigrant Inspector.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Asst. U. S. Attorney.

Attorneys for Respondent. [7]

Received copy of the within demurrer this 10th day of April, 1915.

JOSEPH P. FALLON,

Attorney for Petitioner.

[Endorsed]: Filed Apr. 10, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON, on Habeas
Corpus.

**Opinion and Order Overruling Demurrer and Order-
ing Writ to Issue.**

JOSEPH P. FALLON, Esq., Attorney for Pe-
titioner.

JOHN W. PRESTON, Esq., United States At-
torney and WALTER E. HETTMAN, Esq.,
Assistant United States Attorney, Attor-
neys for Respondent.

DEMURRER TO PETITION FOR WRIT OF
HABEAS CORPUS.

The petitioner, a native of China, came here in 1873 or 1874. In 1894 he registered and received his certificate as a Chinese laborer. He was arrested in Tucson on February 19th, 1915, having been found in a refrigerator car together with a fellow countryman. His case was heard by the Immigration Department, and not before a Commissioner or Judge, on the theory that he had recently entered the United States from Juarez, Mexico. To establish this fact one Pasqual Carrion of Juarez testified on February 26th, before an Immigration Inspector at El Paso that he had seen petitioner a number of times in a laundry at Juarez, the last time being in August or September of 1914. This testimony was not taken in the presence of petitioner, but the witness Carrion identified a photograph of petitioner as that of the man seen by him in the laundry at Juarez.

Under the Chinese Exclusion Act, a Chinese alien unlawfully in the country is entitled to a hearing before a Commissioner or Judge, before he may be deported. At such hearing the ordinary [9] rules of evidence are generally applied. Under the Immigration Act, however, *any* alien may be deported after a hearing before the immigration officers at any time within three years after the date of his entry into the United States, if such entry shall have been in violation of law. The claim here is that as petitioner was identified as having been in Juarez as late as August or September of last year, he must have entered from there in violation of law, as he did not

enter through any of the immigration channels. He was not found on the Mexican border, and the only evidence that he had been out of the United States within the three years, was the evidence of Carrion who did not see the petitioner himself for the purposes of identification, but only a photograph.

The Court does not undertake to prescribe rules of evidence for the Immigration Department, but in a case like the present where the very jurisdiction of the department depends upon the establishment of a certain fact, which fact when established, takes the alien's case out of the jurisdiction of the Courts of the United States where it is placed by the Chinese Exclusion Law, the Court is entitled to regard, not perhaps the weight of the evidence, but certainly the character of the evidence by which such a transfer of jurisdiction is effected. In the case at bar we have a Chinaman, resident of this country for 40 years, having a laborer's certificate entitling him to remain, who is not found near the Mexican border line, and who is ordered deported, without being confronted by the witness upon whose testimony the jurisdiction of the Immigration Department to make the order depends.

In my judgment, while affidavits and *ex parte* statements, and statements not under oath have been held admissible in proceedings by the Immigration Department looking to the exclusion or deportation of aliens, the right to remain here of a Chinese person [10] so long a resident of the United States, and who is fortified by the possession of that evidence of his proper presence here which the law requires should

not be made to depend upon the fact that some resident of another country not produced at the hearing has identified a photograph, when such identification is the only thing which could deprive the alien of his right to be heard before a Commissioner or Judge, where such identification would not be admissible as evidence at all.

Holding these views I am constrained to overrule the demurrer to the petition and direct the issuance of the writ.

The demurrer is therefore overruled, and the writ will issue as prayed for, returnable Saturday, May 22d, 1915, at 10 o'clock A. M.

May 17th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 17, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [11]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, Calif., Greeting:

YOU ARE HEREBY COMMANDED that you have the body of the said person by you imprisoned

and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable M. T. DOOLING, Judge of the District Court of the United States, for the Northern District of California, at the courtroom of said court, in the city and county of San Francisco, California, on the 22d day of May, A. D. 1915, at 10 o'clock A. M. to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable M. T. DOOLING, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 17th day of May, A D. 1915.

[Seal]

M. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [12]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein-named Commissioner of Immigration, Port of San Francisco, California, Angel Island, California, by handing to and leaving a true and attested copy thereof with W. T. Boyce, Assistant Commissioner of Immigration of the Port of San Francisco, Cal., Angel Island, Cal., personally at San Francisco, California,

in said District on the 19th day of May, A. D. 1915.

J. B. HOLOHAN,

U. S. Marshal.

By I. W. GROVER,

Office Deputy.

[Endorsed]: Filed May 21, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON on Habeas
Corpus.

Return [to Writ of Habeas Corpus.]

Now comes Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the order to show cause as to why a writ of habeas corpus should not issue from said court on the petition of Owe Sam Goon, respectively shows that your respondent holds said Owe Sam Goon, an alien, under and by virtue of an order of deportation signed and issued by the Secretary of Labor, after a due and proper consideration of the record in the case of the said Owe Sam Goon.

And respondent further answering said petition of said Owe Sam Goon, admits, denies and alleges as follows, to wit:

I.

Respondent admits the allegations in lines 15 to

20 inclusive of page 1 of said petition.

II.

Respondent admits the allegations in lines 21 to 31 inclusive of page 1 of said petition, but denies the allegations that the said alien Owe Sam Goon has resided continuously in the United States since his arrival here and alleges further that the said alien lived for a period in the year 1914 at Juarez, Mexico, where he was employed in a laundry.

Respondent further denies that the restraint or confinement of the said alien is in any way unlawful, [14]

Respondent admits the allegations in lines 3 to 11 inclusive of page 2 of said petition except that he denies that the said alien was arrested in the month of July, 1914, but alleges that the date of arrest was the first day of March, 1915.

Respondent further denies that the said certificate of registration as a domiciled Chinese laborer was presented to the Immigration Inspector at the time of the arrest but alleges that said certificate was not presented until the case of said alien, Owe Sam Goon, was heard on demurrer to a petition for a writ of habeas corpus before this Honorable Court.

III.

Respondent denies each and every allegation in lines 12 to 21 inclusive of page 2 of said petition.

IV.

Respondent admits the allegations in lines 22 to 33, inclusive, of page 2 of said petition and alleges further that sections 20 and 21 of the General Immigration Laws apply to the case of the said alien

and the Secretary of Labor is given concurrent jurisdiction with any justice, Judge or Commissioner of a court of the United States in ordering the deportation of any alien Chinese found unlawfully in the country.

Respondent further alleges that the warrant of deportation issued under and by virtue of sections 20 and 21 of the General Immigration Laws and without the bringing of the said alien before any justice, Judge or Commissioner of a court of the United States was in no way unfair, improper or illegal.

V.

Respondent admits the allegations in lines 1 to 10, inclusive, of page 3 of said petition. [15]

VI.

Respondent denies each and every allegation in lines 11 to 22, inclusive, of page 3 of said petition.

WHEREFORE, your respondent prays that a writ of habeas corpus do not issue herein, that the order to show cause be discharged and that the petition be dismissed.

JOHN W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Assistant United States Attorney, Attorneys for
Respondent.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant

Inspector connected with the Immigration service for the port of San Francisco, and has been specially directed to appear for and represent the respondent, Samuel W. Backus, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to order to show cause and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the return to order to show cause are true, excepting those matters which are stated on information and belief, and that as to those matters he believes it to be true.

CHARLES D. MAYER,

Subscribed and sworn to before me this 4th day of June, 1915.

[Seal]

T. L. BALDWIN,

Deputy Clerk U. S. District Court Northern District of California. [16]

Received a copy of the within return this 4th of June, 1915.

JOSEPH P. FALLON,

Atty. for Alien.

[Endorsed]: Filed Jun. 4, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Traverse to Return to Writ of Habeas Corpus.

Comes now Ow Seong, the petitioner herein, and files that his traverse to the return of the respondent Samuel W. Backus, Commissioner of Immigration for the Port of San Francisco, and in traversing generally said return your petitioner does hereby deny each and every, all and singular, the material allegations and averments contained in said return which are at variance with or different from or inconsistent with each, any, some or all of the material averments or allegations contained in said petition for a writ of habeas corpus, and your petitioner does hereby reaffirm and reallege each and every, all and singular, the material allegations and averments contained in the petition for a writ of habeas corpus herein, with the same force and effect, and to all intents and purposes as if said material allegations and averments and each and all of them were now fully set forth at length in words and figures in this traverse, and further and specifically traversing said return your petitioner does now admit, deny, affirm and allege as follows, to wit:

Your petitioner traversing the introductory part of said return, admits that the said Samuel W.

Backus holds the said Owe Sam Goon, under and by virtue of an order of deportation signed and issued by the Secretary of Labor, but denies that said order of deportation was issued by said Secretary of Labor after due and proper consideration of the record in the case of the said Owe Sam Goon and in this behalf your petitioner reaffirms and realleges that said order of deportation was issued by and through [18] a manifest abuse of discretion and through errors and mistakes of law.

I.

Your petitioner traversing subdivision I, of said return contained in lines 27 to 28, inclusive, page one of said return, reaffirms and realleges, to wit:

“That the said Owe Sam Goon registered as a Chinese laborer under and by virtue of the act of Congress enacted May 5th, 1892, section 6 thereof, as amended by section I, of the act of Congress, enacted November, 3, 1893, entitled an act to prohibit the coming of Chinese persons to the United States,” and which said allegation is admitted by said return.

II.

Your petitioner traversing the first paragraph of subdivision II of said return, contained in lines 30 on page one and ending on line 6, of page two, of said return, reaffirms and realleges that the said Owe Sam Goon has lived in the United States continuously for a period of forty-two years; that ever since the time of his arrival in the United States he has continuously and is now maintaining a regular residence and domicile within the borders of the United States; and traversing further the said

paragraph your petitioner denies that the said Owe Sam Goon since his arrival in the United States, lived for a period in the year 1914, or at any other time, or at all, at Juarez, Mexico, or that he was ever employed in a laundry or any other establishment, or at all, at Juarez, Mexico.

Your petitioner traversing the second paragraph of subdivision II, lines 7 and 8 inclusive, page 2, of said return reaffirms and realleges that the restraint and confinement of Owe Sam Goon is in every way unlawful;

Your petitioner traversing the third paragraph of subdivision [19] II, lines 9 to 13, page 2 of said return, admits that the arrest of the said Owe Sam Goon took place in March, 1914, instead of July, 1914, as alleged in said petition, and in this behalf alleges that the said date was inserted through a clerical mistake.

Your petitioner traversing the fourth paragraph of subdivision II, lines 14 to 20, page 2 of said return, reaffirms and realleges that the said Owe Sam Goon possesses a certificate of registration, and the possession of said certificate was admitted by the Immigration officials before the hearing on the demurrer to the petition for a writ of habeas corpus before this Honorable Court; and that when the said certificate was introduced into the record, and which said certificate now forms a part of said record, it was admitted by the Government officials to be the duly issued certificate of the said Owe Sam Goon, and your petitioner further reaffirms and alleges, that the said certificate was treated of

no effect or validity.

III.

Your petitioner traversing subdivision III, lines 22 and 23, page 2, reaffirms and realleges that prior to the issuance of said order of deportation, the said Owe Sam Goon, was denied and refused a fair hearing in good faith, such as is guaranteed by law; and said order of deportation was issued by and through a manifest abuse of the discretion committed to each, or any, or all of the persons before whom the matter was considered.

IV.

Your petitioner traversing subdivision IV, lines 25, page 2 to line 1, page 3, inclusive of said return, reaffirms and realleges that said action on the part of said Immigration officials was a violation of section 12 of the act of May 6, 1882, as amended and added to by the act of July 5, 1884, of the laws relating to the admission of Chinese, which provides that; "And any Chinese persons found unlawfully within the United States shall be caused [20] to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, Judge or Commissioner of a court of the United States." Further traversing the said paragraph, your petitioner denies that the Secretary of Labor is given concurrent jurisdiction by sections 20 and 21 of the General Immigration Laws with any justice, Judge or Commissioner of a court of the United States in ordering the deportation of said Owe Sam Goon, and your petitioner further denies that the said Owe

Sam Goon was found in the country unlawfully.

Your petitioner traversing paragraph 2, subdivision IV, lines 3 to 8, inclusive of said return reaffirms and realleges that the warrant of deportation issued under and by virtue of section 20 and 21 of the General Immigration Laws, and without the bringing of the said alien before any justice, Judge or Commissioner of a court of the United States was unfair, improper and illegal.

V.

Your petitioner traversing subdivision five, lines 10 and 11 inclusive of said return, reaffirms and realleges, that said Owe Sam Goon and your petitioner have exhausted all rights and remedies before the Department of Labor; that unless the writ of habeas corpus herein issued in this matter be made final, the said Owe Sam Goon will forthwith be deported from the United States to China.

VI.

Your petitioner traversing subdivision six, lines 22 to 25, page 3, of said return reaffirms and realleges, that there is no legal evidence or any evidence of any kind, and that no evidence of any kind was produced to support the charge or charges against said Owe Sam Goon, and that all the evidence offered by Owe Sam Goon was cast aside and disregarded and not considered by any of the persons claiming the right to arrest and deport said Owe Sam [21] Goon.

Further traversing said return your petitioner further reaffirms and realleges that the said Owe Sam Goon was and is ordered deported without due

process of law or proof of any kind or character, tending to prove or proving the alleged charge or charges wrongfully and illegally brought against him.

WHEREFORE, your petitioner prays that the writ of habeas corpus herein issued in this matter be made final, and that the detained alien go hence without day.

JOSEPH P. FALLON,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Ow Seong, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition, that the same has been read and explained to him, and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters believes it to be true.

(Chinese Characters.)

Subscribed and sworn to before me this 8th day of June, 1915.

[Seal] R. B. TREAT,
Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the within traverse of return this 8th day of June, 1915.

JOHN W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [22]

[Order Discharging Owe Sam Goon from Custody.]

*In the District Court of the United States, Northern
District of California.*

No. 15,802.

In the Matter of OWE SAM GOON on Habeas
Corpus.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been had thereon, it is by the Court now here ordered, that the said named person in whose behalf the writ of habeas corpus herein was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he has been produced, and that he go hence without day.

Entered this 8, day of June, 1915.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

No. 15,802.

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Notice of Appeal.

To the Clerk of said Court and to Joseph P. Fallon,
Esq.:

You and each of you will please take notice that
the respondent herein, Samuel W. Backus, hereby
appeals to the Circuit Court of Appeals for the Ninth
Circuit, from the order and judgment rendered, made
and entered herein on the 8th day of June, 1915,
setting aside the return to the petition for a writ of
habeas corpus and granting the petition for a writ
of habeas corpus filed herein.

Dated San Francisco, June 8th, 1915.

JOHN W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Asst. U. S. Attorney.

Attorneys for Respondent and Petitioner.

Received a copy of the within notice of Appeal
this 8th day of June, 1915.

JOSEPH P. FALLON,

Attorney for Owe Sam Goon.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Petition for Appeal.

Now comes the respondent, Samuel W. Backus, ap-
pellant herein, and says:

That on the 8th day of June, 1915, the above-
entitled court rendered, made and entered its order
and judgment setting aside the return to the Petition
for a writ of habeas corpus and granting the petition
for a writ of habeas corpus as prayed for on file
herein, in which said order and judgment certain
errors were made to the prejudice of this appellant,
all of which will appear in detail from the assign-
ment of errors to be filed herewith.

WHEREFORE, this appellant prays that an ap-
peal may be granted in this behalf to the Circuit
Court of Appeals for the Ninth Circuit, of the United
States, for the correction of the errors so complained
of, and further, that a transcript of the record, pro-
ceedings and papers in the above-entitled matter,
duly authenticated may be sent and transmitted to
the said Circuit Court of Appeals for the Ninth Cir-
cuit of the United States.

Dated San Francisco, June 8th, 1915.

JOHN W. PRESTON,
United States Attorney.

WALTER E. HETTMAN,
Assistant United States Attorney.

Attorney for Respondent and Appellant.

Received a copy of the within Petition for Appeal
this 8th day of June, 1915.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON, on Habeas
Corpus.

Assignment of Errors.

Comes now Samuel W. Backus, Commissioner of Immigration at Angel Island, California, respondent in the above-entitled cause by his attorneys, John W. Preston, United States Attorney, and Walter E. Hettman, Assistant United States Attorney, and for his appeal herein, assigns the following errors which he avers occurred upon the trial or hearing of the petition for a writ of habeas corpus, and upon which he will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

I. That the Court erred in granting the writ of

habeas corpus and discharging the alien Owe Sam Goon.

II. That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause as prayed for in the petition.

III. That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of the writ of habeas corpus.

IV. That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for said Owe Sam Goon was incompetent, and of an insufficient character. [26]

V. That the Court erred in holding that the evidence was not for that proper character upon which the secretary based his warrant of deportation under and by virtue of section 21 of the General Immigration Rules and Regulations for the reason that this same evidence would not be admissible or competent in a deportation proceeding of an alien Chinese unlawfully in the country in a proceeding before a justice, judge or commissioner of a United States court.

VI. That the Court erred in applying the rules of evidence pertaining to a court of law of any justice, judge, or commissioner of the United States to the summary proceeding under the direction of the Secretary of Labor provided for under section 21, of the General Immigration Laws and Regulations.

VII. That the Court erred in discharging the said alien Owe Sam Goon from the custody of said respondent.

WHEREFORE, appellant prays that the judgment and order of the United States District Court in and

for the Northern District of California, made and entered herein in the office of the clerk of the court on the 3d day of June, A. D. 1915, granting the writ of habeas corpus be reversed.

San Francisco, Cal., June 8th, 1915.

JOHN W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Assistant United States Attorney.

Received a copy of the within assignment of errors this 8th day of June, 1915.

JOSEPH P. FALLON,

Attorney for the Petitioner.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,802.

In the Matter of OWE SAM GOON, on Habeas Corpus.

Order Allowing Appeal.

On the 8th day of June, 1915, came the respondent herein, Samuel W. Backus, through his attorneys John W. Preston, United States Attorney, and Walter E. Hettman, Assistant United States Attorney, and filed herein and presented to this Court, his petition praying for the allowance and appeal to the Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and pray-

ing that a transcript of the record and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper;

On condition whereof, the Court hereby allows the appeal herein prayed for, and that a certified transcript of all the record and all proceedings be prepared and presented by the clerk of this court to the Circuit Court of the United States for the Ninth Circuit, in the time prescribed by law.

Dated June 8th, 1915.

M. T. DOOLING,
United States District Judge.

Received a copy of the within order allowing an appeal this 8th day of June, 1915.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,802.

In the Matter of OWE SAM GOON, on Habeas
Corpus.

**Order Transmitting Original Papers to United
States Circuit Court of Appeals.**

It appearing to the Court that an appeal has been

taken in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit; and

It further appearing that the said United States Circuit Court of Appeals in determining said appeal should inspect the following original papers, to wit:

Certified record of the Bureau of Immigration in the case of Ow Sam Goon, being Respondent's Exhibit "A," and Certificate of Residence, No. 21,350 issued to Owe Sam Goon, Chinese laborer, being Petitioner's Exhibit 1.

IT IS HEREBY ORDERED that the clerk of the above-entitled court turn over and deliver to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit the aforesaid original papers, and that the said original papers be filed for safe-keeping with the other papers on file with the said clerk in said cause, and as soon as said cause is determined on appeal by the said Circuit Court of Appeals for the Ninth Circuit, the said original papers are to be returned to the clerk of this court.
[29]

Dated, December 8, 1915.

M. T. DOOLING,

Judge of the District Court of the United States,
Northern District of California, Department
No. 1.

**Stipulation [Re Transmission of Original Exhibits,
etc., to Appellate Court].**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys representing the respective parties in the above-entitled cause, that the original papers herein above set forth may be transferred in their original form (and without being transcribed) to the clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, and that the said original papers may be considered by the said United States Circuit Court of Appeals for the Ninth Circuit in their original form (and without being transcribed) in determining said cause on appeal, without objection on the part of either of the said respective parties.

JOSEPH P. FALLON,
Attorney for Appellee,
JNO. W. PRESTON,
U. S. Attorney,
CASPAR A. ORNBUN,
Asst. U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 8, 1915. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [30]

**Certificate of Clerk, U. S. District Court, to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 30 pages,

numbered from 1 to 30 inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the matter of Owe Sam Goon, on Habeas Corpus, No. 15,802, as the same now remain on file and on record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "praecipe," (copy of which is embodied in this transcript), and the instructions of United States Attorney, attorney for appellant herein.

I further certify that the costs for preparing and certifying the foregoing transcript on appeal is the sum of Fifteen Dollars and Eighty Cents(\$15.80),

Annexed hereto is the original citation on appeal, issued herein (pages 32 and 33).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of December, A. D. 1915.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

CMT.

Deputy Clerk. [31]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Owe Sam Goon and to his Attorney, Joseph P. Fallon, Esq., Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San

Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Division No. 1, thereof, wherein Samuel W. Backus, Commissioner of Immigration for the Port of San Francisco, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this Fifteenth day of June, A. D. 1915.

M. T. DOOLING,
United States District Judge. [32]

United States of America,—ss.

On this 16th day of June, in the year of our Lord one thousand nine hundred and fifteen, personally appeared before me, Joseph E. Connolly, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph Fallon, attorney for Owe Sam Goon.

JOSEPH E. CONNOLLY.

Subscribed and sworn to before me at San Francisco, this 16th day of June, A. D. 1915.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 15,802. United States District Court, for the Northern District of California. Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, Appellant, vs. Owe Sam Goon. Citation on Appeal. Filed Jun. 16, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [33]

[Endorsed]: No. 2702. United States Circuit Court of Appeals for the Ninth Circuit. Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, Appellant, vs. Owe Sam Goon, Appellee. In the Matter of Owe Sam Goon on Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed December 9, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**Certificate of Clerk U. S. District Court as to
Original Exhibits.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California do hereby certify that the annexed document (two in number), being Respondent's Exhibit "A" (Immigration Record), and Petitioner's Exhibit 1 (Certificate of Residence), are the original exhibits, introduced and filed in the matter of Owe Sam Goon. on habeas corpus, No. 15,802, and are herewith trans-

mitted to the Circuit Court of Appeals, for the Ninth Circuit, as per stipulation and order filed in this court, and embodied in the transcript on appeal, herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of December, A. D. 1915.

[Seal]

WALTER B. MALING,
Clerk.

CWT.

By C. W. Calbreath,
Deputy Clerk.

[Petitioner's Exhibit No. 1.]

No. 21350

ORIGINAL

UNITED STATES OF AMERICA.
Certificate of Residence.

Issued to Chinese LABORER, under the Provisions of the Act of May 5, 1892.

This is to Certify THAT Owe Sam Goon, a Chinese
LABORER, now residing at Sacramento, Cal.

has made application No. 2350 to me for a Certificate of Residence, under the provisions of the Act of Congress approved May 5, 1892, and I certify that it appears from the affidavits of witnesses submitted with said application that said Owe Sam Goon was within the limits of the United States at the time of the passage of said Act, and was then residing at Barrow City, New and that he was at that time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese LABORER.

NAME: Owe Sam Goon VIZ. 1
LOCAL RESIDENCE: Sacramento, Cal. AGE: 38 years
OCCUPATION: Cook HEIGHT: 5 ft 4 3/4 COLOR OF EYES: Brown
COMPLEXION: Brown PHYSICAL MARKS OR PECULIARITIES FOR
IDENTIFICATION: Mole on chin

And as a further means of identification, I have affixed hereto a photographic likeness of said Owe Sam Goon

GIVEN UNDER MY HAND AND SEAL this 2nd day
of March, 189 4 at Sacramento.
State of California

M. J. Stewart
Collector of Internal Revenue,

Fourth District of California

2-1408

Owe Sam Goon
21350

35

[Endorsed]: No. 15,802. U. S. District Court, Northern District of California, First Division. In the Matter of Owe Sam Goon on Habeas Corpus. Petnrs. Exhibit "1." Filed Apr. 17, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Case No. 2702. U. S. Circuit Court of Appeals, for the Ninth Circuit. Petitioner's Exhibit No. 1. Filed Dec. 9, 1915. F. D. Monckton, Clerk.

[Respondent's Exhibit "A."]

**U. S. DEPARTMENT OF LABOR.
BUREAU OF IMMIGRATION.**

Subject: No. 53944.
35.

INCLOSURE 28310.

From

**U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.**

Port of
Gen. No. 16.

DEPARTMENT OF LABOR.

No. 53944/35.

San Francisco.

Washington, D. C., March 30th, 1915.

I hereby certify that the annexed is a true copy of the original file constituting the record of the Bureau of Immigration, Washington, D. C., in the case of the alien Ow Sam Goon.

~~on file in the~~

ALFRED HAMPTON,
Acting Commissioner-General of Immigration.
(Official Title.)

OFFICE OF THE SECRETARY.

I hereby certify that Alfred Hampton, who signed the foregoing certificate, is now, and was at the time of signing, Acting Commissioner-General of Immigration and that full faith and credit should be given his certification as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this 30th day of March, one thousand nine hundred and fifteen.

[Seal]

J. M. DENSMORE,
Acting Secretary of Labor.

EFH.

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

944/35.

In answering refer to
No. 5015/122.

Office of Supervising Inspector,
El Paso, Texas.

March 12, 1915.

Received

Bureau of Immigration
Mar. 16, 1915.

Commissioner-General of Immigration,
Washington, D. C.

Referring to Bureau file No. 53865/6, there are returned herewith, duly executed, formal warrants of arrest covering Chinese aliens, as follows:

From El Paso:

No. 53944/21, dated Feb. 10, 1915, covering Sam Kee
and Jeu Koy.

No. 53944/28, dated Feb. 16, 1915, covering Lew Wong and Hom Dock.

No. 53944/30, dated Feb. 18, 1915, covering Hin Lee Woo, Soo Ho Loy and Charlie Kwok Won.

No. 53944/33, dated Feb. 24, 1915, covering Lee Sing and Wong Bing.

No. 53944/37, dated Mch. 2, 1915, covering Haw Jung.

From Tucson:

No. 53352/1, dated Jan. 20, 1915, covering Fung Leung alias Louie Sare Lung.

No. 53908/60, dated Mch. 1, 1915, covering Fung Quan.

No. 53944/13, dated Feb. 1, 1915, covering Chan Ming and Wong See.

No. 53944/22, dated Feb. 11, 1915, covering Soo Buck How.

No. 53944/31, dated Feb. 23, 1915, covering Hoo Jew alias Woo Jew, and Lee Chuck Wah.

No. 53944/35, dated Feb. 27, 1915, covering Ow Sam Goon.

No. 53949/9, dated Feb. 15, 1915, covering Ah Pak.

These aliens were all joined to a party in charge of Inspector Elbert P. Trowbridge, which left El Paso on train No. 9 at 6 P. M., March 10, 1915. This district incurred no expense for attendant incident to any of these deportations.

In addition to the aliens above named, there were joined to the said party (at El Paso) the alien Huie Hong, covered by warrant No. 53944/24, of Feb. 12, 1915, which likewise embraces Wong Sin, whose case has not yet been disposed of, and (at Tucson) the

alien Chin Tong, on judicial writ, Bureau file No. 53867/31.

It is assumed that formal warrants of deportation will be returned to the Bureau by the San Francisco office.

Exact copy as signed by F. W. Berkshire.

Mailed Mar. 12, 1915.

Supervising Inspector.

Inc. No. 2010.

Received Mar. 17, 1915. Correspondence.

WARRANT—ARREST OF ALIEN.
UNITED STATES OF AMERICA.
U. S. DEPARTMENT OF LABOR.

Washington.

El Paso No. 5025/708A.

No. 53944/35.

Received

Mar. 3, 1915,

Immigration Service,
El Paso, Texas.

Received

Mar. 4, 1915,

Immigration Service,
Tucson, Ariz.

To F. W. BERKSHIRE, Supervising Inspector, El Paso, Texas, or to any Immigrant Inspector in the service of the United States:

WHEREAS, from evidence submitted to me, it appears that the alien, Ow Sam Goon, who landed at the port of an unknown port, on or about the 15th day of February, 1915, is subject to be taken into

custody and returned to the country whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese-exclusion laws, for the following among other reasons:

That he re-entered the United States in violation of section 7, Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, whereas, from evidence submitted to me, it appears that the said alien has been found in the United States in violation of the act of February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:

That he entered in violation of section 36 of said act (rule 13).

I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1915." Pending disposition of his case the alien may be released from custody upon furnishing satisfactory bond in the sum of \$2,500.00.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 27th day of February, 1915.

[Seal]

LOUIS F. POST,
Assistant Secretary of Labor.

CEB.

Tucson, Arizona, March 4, 1915.

WARRANT—ARREST OF ALIEN, OW SAM
GOON.

Executed and hearing accorded at Tucson, Arizona,
March 1, 1915.

ALFRED E. BURNETT,
Immigrant Inspector.

Received Mar. 12, 1915, Immigration Service, El
Paso, Texas.

Nos. 53944/17-31-35-37-30.

53903/60.

March 9, 1915.

Immigration Service,
San Francisco, Cal.

Dethrone China Fung Quan, Ow Sam Goon,
Charlie Kwok Won, Soo Ho Loy, all zebu, erudite,
via. Pacific Mail. Detouate China Hoo Jew, zealot,
erudite, via Pacific Mail. Dethrone Mazatlan, Mex-
ico, Haw Jung, zamar, erudite, Lee Chuck Wah,
zealot, erudite, Chin Gim Fook, erudite. Aliens will
be delivered your port with party leaving El Paso
tenth.

Assistant Secretary.

RHH.

515P.

Exact copy as signed by LOUIS F. POST.

Mailed 3/9/15 by O.

Nos. 53944/17-21-33-39-36.

53908/60.

March 8, 1915.

Immigration Service,

El Paso, Texas.

Department Fung Quan, Charlie Kwok Won, Soo Ho Loy, Ow Sam Goon, zebu, Lee Chuck Wah, Hoo Jew, Chin Gim Fook, zealot, and Haw Jung, ——, all erudite, deputize San Francisco with Wednesday's party. If Fung Quan secured certificate by fraud present facts to United States Attorney with a view to prosecution, if facts justify, and stay deportation accordingly.

Assistant Secretary.

CEB.

515P.

Exact copy as signed by LOUIS F. POST.

Mailed 3/9 by J.

WARRANT—DEPORTATION OF ALIEN.

UNITED STATES OF AMERICA.

U. S. DEPARTMENT OF LABOR.

Washington.

No. 53944/35.

To SAMUEL W. BACKUS,

Commissioner of Immigration, Angel Island
Station, San Francisco, Cal.

WHEREAS, from proofs submitted to me, after

due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Ariz., I have become satisfied that the alien, Ow Sam Goon, who landed at an unknown port, subsequent to the 1st day of July, 1914, is subject to be returned to the country whence he came under section 21 of the Immigration Act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, The Chinese-exclusion laws, in that:

He re-entered the United States in violation of section 7, Chinese-exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Ariz., I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, in that:

He entered in violation of section 36 of said act (rule 13),

I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to China, the country whence he came, at the expense of the appropriation "Expenses of Regulating Immigration, 1915." You are directed to purchase steerage transportation for the alien from San Francisco, Cal., to his home in China, via. the Pacific Mail Steamship Company, payable from the above-mentioned appropriation. The alien

will be conveyed to your port in connection with a party from El Paso, Texas, pursuant to telegraphic instructions of this date.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 9th day of March, 1915.

Assistant Secretary of Labor.

CEB.

Exact copy as signed by LOUIS F. POST.

Mailed 3/10 by J.

WIP.

53944/35

Chinese.

March 9, 1915.

In re OW SAM GOON.

Memorandum for the Assistant Secretary:

This Chinese person was arrested at Tuscon, Arizona, on the grounds that he re-entered the United States in violation of Section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese Laborer who failed to produce to the proper officer the return certificate required by said Section; and that he entered in violation of Section 36 of the Immigration Act (Rule 13).

This alien in company with a fellow countryman named Fung Quan was taken from a refrigerator car in the Southern Pacific Railroad yards at Tucson on February 19. Ow Sam Goon claims that he has resided in the United States for 15 years and that he has never left the United States since his arrival in

1873. These statements have been contradicted by the testimony of a witness named Pasqual Carrion who testified that he knew Ow Sam Goon as a resident of Juarez, Mexico, and has seen him in that place on many occasions, the last time being in September, 1914. The above-named alien was unable to produce evidence or witnesses to substantiate his claims and has no papers of any kind to show his right to be and remain in the country. It is not believed that he crossed the border for the purpose of securing a free trip to China, and in fact prefers to be sent to Mexico rather than China. The Bureau is satisfied that the allegations as contained in the outstanding warrant are sustained and recommends alien's deportation to China at Government expense on those grounds.

For the Commissioner-General:

A. WARNER PARKER,

Law Officer.

HMc—M.

Approved:

LOUIS F. POST,

Assistant Secretary.

Received

Mar. 9, 1915.

Correspondence.

U. S. DEPARTMENT OF LABOR.

Immigration Service.

944/35.

In answering refer to

No. 5025/708-A.

Office of Supervising Inspector,

El Paso, Texas.

March 2, 1915.

Received

Bureau of Immigration,

Mar. 6, 1915.

Commissioner-General of Immigration,

Washington, D. C.

There is forwarded herewith record of warrant hearing accorded the Chinese Ow Sam Goon by Inspector Alfred E. Burnett at Tucson, Arizona, March 1, 1915, pursuant to telegraphic warrant of the 27th instant.

The evidence is summarized in the report of Inspector Alfred E. Burnett, No. 1517/151-A of the 1st instant, a copy of which accompanies the record. It appears from the evidence that the person named is an alien, native and subject of China, and entered the United States from Mexico, at some place unknown, subsequent to July 1, 1914, without inspection; further that he is subject to the provisions of section 21 of the Immigration Act, for the reasons stated in the record. The examining officer recommends deportation to Mexico.

This office concurs in the findings of Inspector Burnett. However, there being no evidence showing the alien to have acquired domicile in Mexico, and the circumstances surrounding his arrest clearly demonstrating that he did not effect illegal entry for the purpose of being deported to China at Government expense, the writer recommends deportation to China, the country whence the alien, according to his own testimony, originally came.

F. W. BERKSHIRE,
Supervising Inspector.

Inc. No. 2382.

U. S. DEPARTMENT OF LABOR.

Immigration Service.

In answering refer to

No. 1517/151-A.

Office of Inspector in Charge,
Tucson, Ariz.

March 1, 1915.

Supervising Inspector,
Immigration Service,
El Paso, Texas.

Referring to your file No. 5025/708-A, there is transmitted herewith in duplicate record of hearing accorded the alien, Ow Sam Goon, pursuant to Departmental telegraphic warrant dated February 27, 1915, the charges therein being represented by a translation of the code-words "zebu" and "erudite."

The record hereunder sustains both charges. The essential elements in the case may be summarized briefly as follows: The subject of these proceedings, with a Chinaman who gave the name Fung Quan,

alias Poong Quan, alias Poon Wah Poo, was taken from the vent of a refrigerator car in the local S. P. railroad yards on the 19th instant; Ow Sam Goon claims that after having resided in the United States for some forty years, he left Sacramento, California, some eight months ago and wandered down into this part of the country seeking employment; that a few hours before he got into the car he arrived at a place called Tucson and there entered the car, finding that the man apprehended with him was already in the car; that he traveled therein several hours before he was taken therefrom by an officer of this place (Tucson, which he apparently thought was Los Angeles, California); he claims that he has never left the United States since his first arrival in 1873 or 1874; that at the time of his first arrival in this country he was a cook, and that he has been a laborer all the time in the United States; he claims that, not having been out of the United States, he, of course, has not at any time presented to an Immigration officer the return certificate required of laborers by the Chinese-exclusion Act, and that at no time within the last three years has he been inspected at a port of entry for aliens generally by an Immigration officer. The witness Pasqual Carrion, in his statement before Inspector Wilmoth at El Paso, Texas, February 26, 1915, testified that he knew Ow Sam Goon as a resident of Juarez, Mexico, seeing him in that place on several occasions, the last of which was either in August or September, 1914; this witness testified from a photograph of Ow Sam Goon which was forwarded to your office from this office, and which has

been thoroughly identified by the witness, his examining officer, and the alien Ow Sam Goon.

Having in mind the last sentence of Bureau circular letter No. 53858/49-53855/28 dated January 28, 1915, I have recommended the alien's deportation to Mexico rather than to China. The alien probably has a certificate of residence in the keeping of a friend in Sacramento, California, to which place he will probably endeavor to return in the course of time; it is suggested, in view of this and all other circumstances of the case, that deportation be effected to Mazatlan, Mexico, rather than across the land boundary of the United States and Mexico.

Inspector in Charge.

AOH. incl. 3040.

Exact copy as signed by ALFRED E. BURNETT.
Mailed Mar. 1, 1915, by AOH.

Received
Mar. 2, 1915,
Immigration Service,
El Paso, Texas.

WARRANT HEARING.

IMMIGRATION SERVICE, MEXICAN BORDER DISTRICT.

File No. 1517/151-A.

IN THE MATTER OF OW SAM GOON, arrested pursuant to Departmental telegraphic warrant dated February 27, 1915, charged with being unlawfully in the United States in that he entered in violation of section 36 of the Act approved February 20, 1907, and Rule 13, Immigration Rules; and charging further that he is subject to be taken into custody

and returned to the country whence he came under section 21 of the above-mentioned Act, being subject to deportation under the provisions of a law of the United States—to wit, the Chinese-exclusion laws—for the reason that he re-entered the United States in violation of section 7 of the Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section.

Hearing had before Immigrant Inspector ALFRED E. BURNETT, in the office of the Inspector in Charge, Tucson, Arizona, on this 1st day of March, 1915.

Present: ALFRED E. BURNETT, Examining Officer.

W. WHITE THACHER, Chinese Interpreter.

ABRAM O. HADDEN, Stenographer.

Warrant presented, read, and explained to the alien, who is advised of the nature of the proceedings, and that he may be released from custody during the pendency of the case upon furnishing a satisfactory bond in the sum of Twenty-five Hundred Dollars (\$2,500.00).

Medical examiner certifies alien afflicted “with slight mitral regurgitation; can be deported without danger to life.” Certificate attached.

ALIEN SWORN.

My name is Ow Sam Goon, no other name; I am fifty-nine years of age; I was born in Oong Woo Lay village, H. P. District, China; I am a citizen of China;

and of the Chinese race; I entered the United States in 1873 or 1874 at the Port of San Francisco, California, coming directly from Hong Kong, China; my occupation at that time was cook, I am still a cook; in the United States I have no relatives; I have two nephews, Ow Sing Deck and Ow Sing Look, in my native village, China.

(Examining Officer to Alien.)

Q. You claim to be a native-born citizen of China, do you? A. Yes.

Q. You made a sworn statement before me in this office February 20, 1915, relative to your right to be and remain in the United States, did you not?

A. Yes.

Q. Were all the statements made by you on that occasion true? A. All true.

Q. Do you desire to change any of the testimony you gave at that time?

A. I do not wish to change any of it.

Q. Now, you are advised that a transcript of that statement accompanied the formal application for warrant of arrest in your case, and that the same will be considered by the Department in connection with the final determination of your case.

A. I don't want to change any of the statements; let it go as it was.

Q. Now, from your statement it appears that you and another Chinaman who gave his name as Fung Quan, alias Poong Quan, alias Poong Wah Poo, were taken from the vent of a refrigerator car which arrived from the east in Southern Pacific freight train on the night of the 19th ultimo in this city. Is

that true? A. Yes, sir.

Q. And in that statement you claimed that you had boarded that car several hours before it arrived at the place where you were taken out by an officer. Is that true? A. About that length of time.

Q. And you claimed also that you had boarded that car at the town of Tucson, somewhere east of the place where you were apprehended, and that you did not know at the time you were testifying before me that you were then in the city of Tucson.

A. I understood it was the place called Tucson, though I did not know.

Q. You claimed also at that time that you had walked to the place where you boarded that car, from the vicinity of Sacramento, California, coming via Fresno, California, recently. Is that true?

A. I did not come direct, but I had been wandering for some time looking for work, and finally I got to the place called Tucson, where I got in the car.

Q. I now introduce in evidence as a part of the record of hearing in your case, transcript of statement made by the witness Pasqual Carrion before Immigrant Inspector Grover C. Wilmoth in the office of the Supervising Inspector, El Paso, Texas, on February 26, 1915. This statement will be attached to the record and marked "Exhibit 1" for identification. The Interpreter will now translate to you said statement.

(Statement referred to as "Exhibit 1" translated to the alien by Chinese Interpreter Thacher.)

(Examining Officer to Alien.)

Q. I now introduce in evidence statement made by

Immigrant Inspector Grover C. Wilmoth in the office of the Supervising Inspector, U. S. Immigration Service, El Paso, Texas, February 27, 1915, said statement being identified by the signature of the maker and by the notation "El Paso file No. 5025/708-A." To the original signed statement is firmly attached in the upper left-hand corner a photograph bearing at the top thereof above the head of the person represented, the signature of "P. Carrion" written in ink; bearing also across the lower part of the photograph and extending from the right shoulder across the body, the words written in ink, "Ow Sam Goon"; and still lower on the photograph the signature "Grover C. Wilmoth, February 26, 1915." This original statement with the photograph attached will accompany the record of hearing in your case, marked for identification "Exhibit 2." The Interpreter will translate said statement to you.

(Statement referred to as "Exhibit 2" translated to the alien by Chinese Interpreter Thacher.)

(Examining Officer to Alien.)

Q. Look at the photograph attached to "Exhibit 2" and state whether or not it is a photograph of yourself. A. Yes.

Q. Is that the photograph made here in Tucson after you were taken out of the box-car?

A. Yes, I was photographed in the back room there.

Q. What, if anything, have you to say in answer to the testimony of the witness Pasqual Carrion to the effect that you were in Juarez, Mexico, in August or September, 1914?

A. If he states that he has seen me in Juarez,

Mexico, what can I say; if he says he has seen me there I cannot say anything else.

Q. Then you don't deny that this witness did see you in Juarez, Mexico, in August or September, 1914?

A. I have never been there, I don't know the place.

Q. Do you desire to offer any testimony in support of your claim that you have never been in Juarez, Mexico?

A. No, I cannot offer any evidence or any witnesses.

Q. Have you at any time since July 1, 1914, produced to the proper officer the return certificate which is required by the Chinese-exclusion laws of all Chinese laborers who return to this country after a temporary visit abroad? A. No.

Q. Have you ever at any time presented to an Immigration officer a Chinese laborer's return certificate? A. No.

Q. Have you at any time within the last three years made application to an Immigration officer at a port of entry for Chinese or at a port of entry for aliens generally for admission to the United States?

A. No, I have never had anything to do with the Immigration office; I haven't seen any of them within that period.

Q. You are advised that you have a right to be represented by counsel at this hearing. Do you desire to avail yourself of this right?

A. If I engage an attorney it will cost money, and I have no money to engage one.

Q. Do you waive all right to be represented by counsel at this hearing? A. Yes, sir.

Q. How much money have you?

A. Two dollars.

Q. Have you any property or personal effects in the United States, aside from what you brought here with you? A. No.

Q. In case you are ordered deported, do you desire to be sent to Hong Kong, China, or to Mexico?

A. I cannot say; if you deport me to whichever place, why I have no choice in the matter.

Q. If you are deported to Mexico, would you prefer to be sent to Mazatlan, or would it suit you better to go to Nogales, Sonora, or to Juarez, Mexico?

A. Not having been to any of these places before, I would ask your recommendation, whichever place I could secure work you could recommend to me. If you send me back to China, it will cost about twelve dollars to go from Hong Kong to my home village, and I would rather be sent to some place where I could work two or three years and pay my way back to China. I have been in the United States forty-odd years, and I have never been back at all, and if I were to say that I came from China through Mexico and came into the United States I would be telling an untruth.

Do you desire to offer any evidence in support of your contention? A. No.

Q. Is there any further statement you desire to make to show cause why you should not be deported in conformity with law?

A. Nothing else to say; wherever you deport me I will have to go.

Q. Will you be able to furnish bond? A. No.

(NOTE BY EXAMINING OFFICER: Alien appears to be in normal mental and physical condition.)

Findings.

From the foregoing evidence, the alien OW SAM GOON, who entered the United States from Mexico at some place unknown subsequent to July 1, 1914, is found to be in the United States in violation of section 20 of the act approved February 20, 1907, in that he entered in violation of section 36 thereof, and Rule 13, Immigration Rules. It is further found from the evidence that said alien is subject to be taken into custody and returned to the country whence he came under section 21 of the above-mentioned act, being subject to deportation under the provisions of a law of the United States—to wit, the Chinese-exclusion laws—for the following among other reasons, to wit: That he is a Chinese laborer who failed when he re-entered the United States to produce to the proper officer the return certificate required by section 7 of the Chinese-exclusion act of September 13, 1888.

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED to the Honorable Secretary of Labor that said alien be deported to Mexico, the country whence he came, in accordance with the provisions of sections 20 and 21 of the act approved February 20, 1907, as amended March 26, 1910, and that deportation be effected to the port of Mazatlan, Mexico.

ALFRED E. BURNETT.

Examining Officer.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of hearing in this case.

ABRAM O. HADDEN,
Stenographer.

Received Feb. 28, 1915. Immigration Service,
Tucson, Ariz.

Received Mar. 2, 1915. Immigration Service. El
Paso, Texas.

In the Matter of OW SAM GOON.

Statement of PASCUAL CARRION, taken by
GROVER C. WILMOTH, Immigrant Inspector in
the office of the Supervising Inspector, El Paso,
Texas, February 26, 1915.

Present: GROVER C. WILMOTH, Examining In-
spector.

M. S. BUTTNER, Interpreter.

WILLIAM A. BRAND, Acting Stenog-
rapher.

Witness sworn.

Q. What is your name?

A. Pascual Carrion.

Q. How old are you? A. 36 years old.

Q. Where do you live?

A. In Juarez, Mexico. No. 70 Comercio Street.

Q. How long have you lived in Juarez?

A. About seven years.

Q. What is your business in Juarez, Mexico?

A. I am the manager of the Water Works Department of the City of Juarez, and also at the same address I run a plumbing and tinning shop of my own; I also hold a commission to over-see the Chinese

business in Juarez, looking after the opium and other details in the Chinese line.

Q. I understand you said on a previous occasion that you came in frequent contact with Chinese persons in Juarez, Mexico.

A. Yes, with the commission I hold from the Presidents in Juarez, Mexico, I come in direct contact with them and am well acquainted with the majority of the Chinese in Juarez.

Q. I show you a photograph here, on the face of which is marked "Ow Sam Goon." Will you state whether you have seen the original of that picture?

A. Yes sir; I have already stated to the officer who showed me the picture in Juarez that I knew him; immediately I saw the photograph I told him that I was familiar with the Chinaman and saw him on many occasions.

Q. Where did you see him and when?

A. I knew him at a laundry on a street called Noche Triets, behind a carpenter and blacksmith's shop, in Juarez, Mexico. I also wish to state that the police department in Juarez, after my talking to them and showing them the picture of the Chinaman referred to, they verified my statement to the effect that this Chinaman was in Juarez sometime ago.

Q. About how many occasions would you say you saw him in Juarez?

A. On several occasions when I had to go to this carpenter and blacksmith's shop to have work done in connection with my establishment, I saw the Chinaman quite often at this laundry, which adjoins

this establishment; I cannot recollect how many times, but many times.

Q. There is no doubt in your mind that the original of this photograph is a Chinese person whom you knew in Juarez, Mexico?

A. No sir, there is no doubt in my mind that this is the same Chinaman whom I knew in Juarez. Yesterday when I saw the two photographs, I immediately recognized this one, and said so to Inspector Buttner. Besides that I showed the photograph to the fellows in the police department there and they verified my statement and said they also knew him. One of the fellows that verified my statement is a ranger that lives next door to the laundry where this Chinaman was employed.

Q. When was the last time you saw this Chinaman, as well as you can remember?

A. I can't state exactly as to which of the two months it was last year; the last time I saw him over there was either in August or September last year. I will probably have to look up my records to see when I had work done at the blacksmith's shop about that time before I can state for sure.

Q. Sign the notes:

A. Witness requests that his statement be read over to him, which was done, after which he signed his name as follows: (traced by the stenographer)

P. CARRION.

I certify that the foregoing is a true and correct transcript of the notes taken by me at this examination.

WILLIAM A. BRAND,

Acting Stenographer.

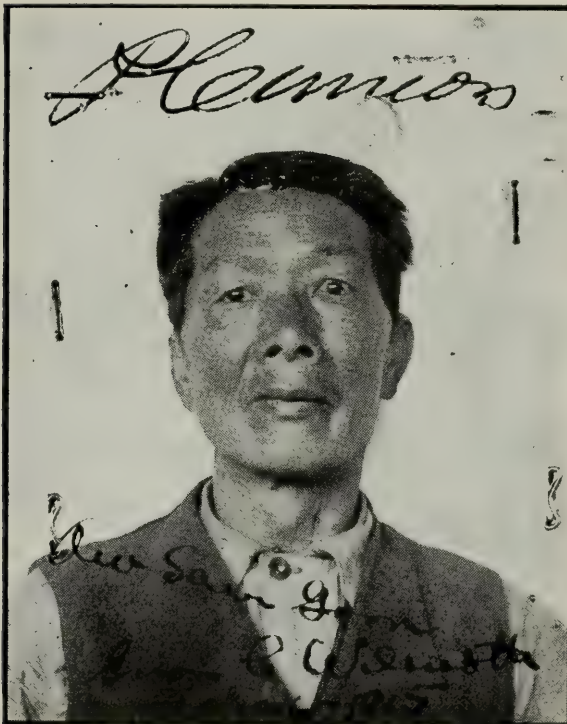
MORRIS S. BUTTNER,

Interpreter.

GROVER C. WILMOTH,

Immigrant Inspector.

EXHIBIT NO. 2.



Received Feb. 28, 1915, Immigration Service, Tucson, Ariz.

El Paso File No. 5025/708-A.

Statement of Immigrant Inspector GROVER C. WILMOTH: In the office of the Supervising Inspector, U. S. Immigration Service, El Paso, Texas, February 27, 1915.

I am an Immigrant Inspector of the United States Immigration Service, stationed at El Paso, Texas.

I have been connected with the said Service for the past seven years. In the course of my duties as such Immigrant Inspector, on February 26, 1915, I personally conducted the examination of the witness Pascual Carrion, who identified a photograph shown him as that of a Chinese person whom he knew in Juarez, Mexico, and had frequently seen in that city. At that examination W. A. Brand acted as stenographer, and M. S. Buttner acted as Spanish Interpreter, the witness speaking the Spanish languages. The photograph exhibited by me to the witness Pascual Carrion on February 28, 1915, and identified by him as a likeness of a Chinese person personally known by him in Juarez, Mexico, is firmly attached to the upper left hand corner hereof. This photograph bears at the top thereof, above the head of the person represented, the signature "Pascual Carrion," written in ink; extending from the right shoulder across the body is written, in ink, "Ow Sam Goon"; across the bottom of the photograph is written, likewise in ink, "Grover C. Wilmoth, Feb. 26, 1915." This is the same photograph received at this office through the mails with letter from the Inspector in Charge at Tucson, Arizona, No. 1517/151 of February 28, 1915.

GROVER C. WILMOTH,

Immigrant Inspector.

Received bureau of immigration Mar. 3, 1915.

Application for Warrant of Arrest under Sections
20 and 21 of the Act of February 20, 1907.

DEPARTMENT OF COMMERCE AND LABOR
IMMIGRATION SERVICE.

File No. 5025/708-A.

(Place) El Paso, Texas,
February 27, 1915.

The undersigned respectfully recommends that the Secretary of Commerce and Labor issue his warrant for the arrest of Ow Sam Goon, Chinese, male (telegraphic warrant applied for February 26, 1915) the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

The person named is an alien, native and subject of China, and entered the United States from Mexico at some place unknown, subsequent to July 1, 1914, without inspection; further he re-entered the United States in violation of section 7 Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said act. These charges are shown by exhibit "A," consisting of statement of the alien taken at Tucson, Arizona, by Inspector Alfred E. Burnett, February 20, 1915; statement of Pascual Carrion, made to Immigrant Inspector Grover C. Wilmoth at El Paso, Texas, February 26,

1915, marked exhibit "B;" and copy of statement of Immigrant Inspector Grover C. Wilmoth of February 27, 1915, marked exhibit "C."

(2) The present location and occupation of above-named alien are as follows: United States detention quarters, Tucson, Arizona.

Pursuant to Rule 35 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in paragraph (c) of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States. Verification of landing not submitted as entry without inspection was effected, and there is no record of landing extant.

MWB. (Signature) F. W. BERKSHIRE,
(Official title) Supervising Inspector.

File W.W.

El Paso File No. 5025/708-A.

Statement of Immigration Inspector GROVER C. WILMOTH: In the Office of the Supervising Inspector, U. S. Immigration Service, El Paso, Texas, February 27, 1915.

I am an Immigrant Inspector of the United States Immigration Service, stationed at El Paso, Texas. I have been connected with the said Service for the past seven years. In the course of my duties as such Immigrant Inspector, on February 26, 1915, I personally conducted the examination of the witness Pascual Carrion, who identified a photograph shown him as that of a Chinese person whom he knew in Juarez, Mexico, and had frequently seen in that

city. At that examination W. A. Brand acted as stenographer, and M. S. Buttner acted as Spanish Interpreter, the witness speaking the Spanish language. The photograph exhibited by me to the witness Pascual Carrion on February 26, 1915, and identified by him as a likeness of a Chinese person personally known by him in Juaraz, Mexico, is firmly attached to the upper left hand corner hereof. This photograph bears at the top thereof, above the head of the person represented, the signature "Pascual Carrion," written in ink; extending from the right shoulder across the body is written, in ink, "Ow Sam Goon"; across the bottom of the photograph is written, likewise in ink, "Grover C. Wilmoth, Feb, 26, 1915." This is the same photograph received at this office through the mails with letter from the Inspector in Charge at Tucson, Arizona, No. 1517/151 of February 22, 1915.

GROVER C. WILMOTH,
Immigrant Inspector.

Received Mar. 3, 1915. Correspondence.
File No. 5025/708.

In the Matter of OW SAM GOON.

Statement of PASCUAL CARRION, taken by
GROVER C. WILMOTH, Immigrant Inspector in
the office of the Supervising Inspector, El Paso,
Texas. February 26, 1915.

Present: GROVER C. WILMOTH, Examining
Inspector.

M. S. BUTTNER, Interpreter.

WILLIAM A. BRAND, Acting Steno-
grapher.

Witness sworn.

Q. What is your name? A. Pascual Carrion.

Q. How old are you? A. 36 years old.

Q. Where do you live?

A. In Juarez, Mexico. No. 70 Comercio Street.

Q. How long have you lived in Juarez?

A. About seven years.

Q. What is your business in Juarez, Mexico?

A. I am the manager of the Water Works Department of the City of Juarez, and also at the same address I run a plumbing and tinning shop of my own; I also hold a commission to over-see the Chinese business in Juarez, looking after the opium and other details in the Chinese line.

Q. I understand you said on a previous occasion that you came in frequent contact with Chinese persons in Juarez, Mexico.

A. Yes, with the commision I hold from the President in Juarez, Mexico, I come in direct contact with them and am well acquainted with the majority of the Chinese in Juarez.

Q. I show you a photograph here, on the face of which is marked "Ow Sam Goon." Will you state whether you have seen the original of that picture?

A. Yes, sir; I have already stated to the officer who showed me the picture in Juarez that I knew him; immediately I saw the photograph I told him

that I was familiar with the Chinaman and saw him on many occasions.

Q. Where did you see him and when?

A. I knew him at a laundry on a street called Noche Triete, behind a carpenter and blacksmith's shop, in Juarez, Mexico. I also wish to state that the police department in Juarez, after my talking to them and showing them the picture of the Chinaman referred to, they verified my statement to the effect that this Chinaman was in Juarez sometime ago.

Q. About how many occasions would you say you saw him in Juarez?

A. On several occasions when I had to go to this carpenter and blacksmith's shop to have work done in connection with my establishment, I saw the Chinaman quite often at this laundry, which adjoins this establishment; I cannot recollect how many times, but many times.

Q. There is no doubt in your mind that the original of this photograph is a Chinese person whom you knew in Juarez, Mexico?

A. No, sir, there is no doubt in my mind that this is the same Chinaman whom I knew in Juarez. Yesterday when I saw the two photographs, I immediately recognized this one, and said so to Inspector Buttner. Besides that I showed the photograph to the fellows in the police department there and they verified my statement and said that they also knew him. One of the fellows that verified my statement is a ranger that lives next door to the laundry where this Chinaman was employed.

Q. When was the last time you saw this Chinaman, as well as you can remember?

A. I can't state exactly as to which of the two months it was last year; the last time I saw him over there was either in August or September last year. I will probably have to look up my records to see when I had work done at the blacksmith's shop about that time before I can state for sure.

Q. Sign the notes:

A. Witness requests that his statement be read over to him, which was done, after which he signed his name as follows: (traced by the stenographer).

P. CARRION.

I certify that the foregoing is a true and correct transcript of the notes taken by me at this examination.

WILLIAM A. BRAND,
Acting Stenographer.

GROVER C. WILMOTH,
Immigrant Inspector.

MORRIS S. BUTTNER,
Interpreter.

Received Feb. 25, 1915. Immigration Service, El Paso, Texas.

OFFICE OF INSPECTOR IN CHARGE.

Tuscon, Arizona, February 20, 1915.

File No. 1517/151-A.

Statement of OW SAM GOON.

Present: ALFRED E. BURNETT, Examining
Officer.

W. WHITE THACHER, Chinese Inter-
preter.

ABRAM O. HADDEN, Stenographer.

(Examining Officer to Alien:)

I am a Chinese Inspector in the service of the United States. I desire to take a statement from you relative to your right to be in this country. Such statement, if made, is to be voluntary on your part, and you are warned that same may be used against you in any subsequent proceedings which may arise.

ALIEN.—All right.

Alien Sworn.

(Examining officer to Alien:)

Q. What is your name? A. Ow Sam Goon.

Q. What is your marriage name?

A. I am not married.

Q. Have you ever been known by any other name than Ow Sam Goon?

A. White people call me "Sam." That is the only other name I have ever been known by.

Q. Write your name in the stenographer's notes.

(Alien wrote his name in the stenographer's notebook as follows:)

Q. Can you write your name in English?

A. No.

Q. How old are you? A. Fifty-nine.

Q. What is your occupation? A. Cook.

Q. Have you always been a cook? A. Yes, sir.

Q. Did you ever follow any other occupation?

A. No.

Q. In what village and district were you born?

A. Ong Woo Loy village, H. P. District, China.

Q. Are you a citizen of China, and of the Chinese race? A. Yes.

Q. What is your wife's name? A. No wife.

Q. Never been married? A. No, sir.

Q. How many brothers did you have?

A. I had one elder brother; he is dead.

Q. Did you have but one brother?

A. That is all.

Q. Where did your brother die? A. In China.

Q. Did he ever come to this country? A. No.

Q. Are your parents dead? A. Yes, sir.

Q. Did they ever come to this country?

A. No, sir.

Q. How long has your father been dead?

A. Died when I was seven years of age.

Q. How long has your mother been dead?

A. When I was twenty-four years of age.

Q. When and where did you first come to this country?

A. 1874 or 1873. Those are the two dates I have been able to pick up since I have been here.

Q. What date Chinese calendar did you come to this country?

A. T. C. 13/5 month (between June and July, 1874); the steamer only made one trip to the United States, a very small steamer.

Q. Where did you land from that steamer?

A. San Francisco.

Q. How many trips have you made back to China?

A. I have never been back.

Q. How long did you live in San Francisco after arriving there first?

A. I was only two days in San Francisco, then I went to Sacramento.

Q. How long did you stay continuously in Sacramento?

A. Over forty years, ever since I came to the United States.

Q. Did you go to any other place to live awhile during those forty years?

A. Carson City, Nevada.

Q. When did you go there, and how long did you stay?

A. I went there in K. S. 16th year, worked for four months, and then returned to Sacramento.

Q. Have you ever lived anywhere else in the United States except Sacramento and Carson City?

A. I was also a year in Chico, California.

Q. What year was that?

A. K. S. ninth year.

Q. Have you lived anywhere else besides those three places? A. That is all, sir.

Q. Now, when did you last leave Sacramento?

A. Three months ago.

Q. Give me the exact date.

A. I cannot recollect.

Q. But you are sure it has been just about three months ago, are you? A. Yes, sir.

Q. What was the last job you had in Sacramento?

A. At the French restaurant, between Fifth and

K streets, Sacramento.

Q. What were you doing in that restaurant?

A. Cook.

Q. How long did you cook there continuously?

A. Over ten years.

Q. Now, when did you cease to be the cook at the French restaurant?

A. About four years and three or six months ago.

Q. And you haven't had a job whatever during the last four years and three months?

A. After that sometimes I worked in the camp and sometimes I worked with private families.

Q. Now, you told me a moment ago that the last job you had was as a cook in the French restaurant. Now, you want to change that answer, do you?

A. No; what I meant was that the last steady job that I had was at the restaurant; after that I worked in several different places, and the last place was in a hotel and restaurant along the river there on First street.

Q. What was the name of that hotel and restaurant?

A. It is not exactly a hotel; it is a sort of a boarding house where they come and board. I only worked there four days.

Q. When was that you worked four days in that place? A. Five months ago.

Q. Who was the proprietor of that boarding house?

A. All I know is Mrs. Ly (phonetic) a white woman; that is all I know about it.

Q. Who was the head cook there?

A. I was the only cook there.

Q. And those four days' work at that boarding house five months ago was the very last work you have done. Is that correct? A. Yes, sir.

Q. Now, what was the last job you had just before that?

A. At Lewisville and also some other place close by doing sundry work.

Q. You told me a moment ago that you had never lived at any place except Sacramento, Carson City, and Chico. Now you say you lived at Lewisville.

A. I included Lewisville in Sacramento, because it is close by, it is only eighteen miles away.

Q. How long did you work at Lewisville?

A. Twenty-eight days.

Q. What did you do there? A. Cook.

Q. For whom?

A. At the Lee Poy restaurant in Lewisville.

Q. When did you leave that job?

A. About a year ago.

Q. Who was the proprietor of that restaurant?

A. Lee Poy is the manager; the restaurant is run under his name.

Q. Is he there now?

A. That I don't know; when I left he was still there.

Q. Have you heard from him since you left Lewisville?

A. No, he does not know where I have gone.

Q. Can you give me the month and year in which you left that restaurant in Lewisville?

A. About the fifth month of last year (between

May and June, 1914).

Q. Where did you go then?

A. Returned to Sacramento.

Q. What was the next job you had?

A. Then I went to work in that boarding-house on First street for four days.

Q. Where have you been eating and sleeping since you left Lee Poy's place until recently?

A. I rented a room at 909 $\frac{1}{2}$ Third street, Sacramento.

Q. Did you eat and sleep in that room?

A. Yes, sir.

Q. From whom did you rent?

A. Yuen Sieu; he is the man that rents these rooms out.

Q. Is that lodging house at 909 $\frac{1}{2}$ Third street?

A. Yes, sir.

Q. Was your room in the basement, first, second, or third floor? A. Basement.

Q. Did Yuen Sieu himself have rooms in the basement?

A. He also lived in the basement. The room above is a store.

Q. What is the name of that store?

A. Hung Loong, tailor-shop.

Q. Who is the boss man in the tailor-shop?

A. His family name is Loui, but I don't know his other name, as I have no communications with him.

Q. Did you know the men that worked in that tailor-shop? A. No.

Q. The man that rented you your room, Yuen Sieu, do you know him well?

A. He has known me for a long time.

Q. Now, when did you give up your room in the basement at 909½ Third Street, Sacramento?

A. About eight months ago.

Q. Then where did you go to sleep?

A. Then, when I gave up the room I went to Lodi.

Q. Have you been in Lodi ever since eight months ago? A. No, then I came straight out.

Q. How long did you live at Lodi?

A. Three days.

Q. Then where did you go directly from Lodi?

A. Then I went to Hoot (phonetic) Station, thirty-five cents car-fare.

Q. How long did you stay there? A. Six days.

Q. Then where did you go?

A. Then I walked to Madera.

Q. How long did you stay in Madera?

A. About four days.

Q. Then where?

A. Then I went,—I don't know the name of the place where I went to, I walked all the way.

Q. How long has it been since you left Madera, California? A. About four months ago.

Q. But you say you haven't been in Sacramento for eight months? A. Yes.

Q. Did it take you four months to go from Sacramento to Madera?

A. I went to different places to look for work, but I didn't go direct.

Q. Now, you left Madera about four months ago. What was the next town you came to?

A. Stayed over night one night in Fresno, where I bought some bread.

Q. And then what was the next town?

A. Then I followed the road, I don't know where I went to.

Q. Can you name any of the towns you passed through since you left Fresno?

A. I didn't pass any towns there; I spent the night in barns and stables out in the country.

Q. In walking down into this country from Madera and Fresno, California, have you traveled along the railroad track altogether?

A. Followed the carriage road.

Q. Have you ever been in Los Angeles?

A. I don't know that place.

Q. Have you ridden on the cars any since you left Madera? A. No.

Q. Now, you and Poong Quan were taken out of the ice-box of a refrigerator-car last night, weren't you? A. Yes, sir.

Q. How long had you been in that car?

A. We got in last night only.

Q. You told me last night that you had been in that car five or six hours when taken out. Is that true?

A. I am not exactly sure, but I think it is about that time; as I entered the car it was just about getting dark.

Q. What is the name of that place where you got into that car? A. I don't know.

Q. Now, you told me last night that you got into that car at a place called Tucson and pointed off in an easterly direction from this place.

A. No, what I meant to say was that I intended

to come to Tucson to find work.

Q. Where are you now? A. I don't know.

Q. Well, what was the name of that town where you got into that box car? A. I don't know.

Q. How many times did the train stop after you got into the car until it stopped at this place?

A. That I am not sure; it must have stopped once, but I am not sure, as I was sleepy and kind of dozed off.

Q. Was the train running pretty fast a part of the time? A. Not very fast.

Q. Now, you are pretty sure that you rode in that car five or six hours before you were caught, are you?

A. I am not sure of the exact length of time, as I had no watch.

Q. Was it several hours?

A. About several hours.

Q. Did you get into that car while the train had stopped on a side track at a town?

A. I got into the car right close to the town.

Q. Was it a large town or a small town?

A. Very small place only.

Q. Who put you into that car?

A. I climbed up myself.

Q. Now, your traveling companion says that you and he got into that car together. Is that true?

A. No, sir; he is not telling the truth.

Q. Well, did you get in first or did he get in first?

A. He was in there first; when I went in I found him inside.

Q. Did you see him get in? A. No.

Q. He says that he got into that car at a place called Tucson, about a five or six-hour run from here. Do you think that is true?

A. That I don't know.

Q. Now, how much did you pay the brakeman to haul into this place? A. Nothing.

Q. Did you see any member of the train crew while you were in the car? A. No, sir.

Q. Now, did you have any food and water in the car? A. I had some coffee.

Q. Take it into the car with you?

A. I had it in a bottle.

Q. You had a loaf of bread, too, didn't you?

A. No, sir; the small pieces are mine.

Q. Where did you get these small pieces of bread?

A. A lady gave it to me.

Q. Where?

A. In a garden there, but I don't know the name of the place.

Q. Near the town where you got into the car?

A. Yes, sir; about four or five miles away.

Q. Now, here is an ordinary white cook apron that your traveling companion says you took out of your pocket to wrap up the bread in. Is this your apron?

A. Yes, sir.

Q. Where did you get this apron?

A. Brought it from Sacramento.

Q. Now, you say this loaf of bread with the paper around it is not yours. Whose is it?

A. It is not mine; it belongs to the other Chinaman.

Q. Now, in the car vent in which you and Poong

Quan were, were two pieces of rugs. Where did they they come from? A. I don't know.

Q. They are not yours?

A. No, this apron is mine only; I acknowledge it.

Q. Now, how long had you been at that little town where you got into this car? A. About two hours.

Q. Any Chinese live at that place?

A. No; I didn't even see a white man.

Q. Why did you come down into this country from Sacramento? A. To look for work.

Q. Who told you there was any work to be had down in this country?

A. They said that in Los Angeles and round about here there was plenty of work to be found, so that is why I came.

Q. You told me a while ago you never heard of this place Los Angeles.

A. I meant that I did not know the place.

Q. Do you tink this town you are in now is Los Angeles? A. I don't know.

Q. Didn't you say you were trying to go to Tucson? A. Yes, sir.

Q. Do you know anybody at Tucson? A. No.

Q. Why are you trying to go to Tucson, then?

A. I heard the name Tucson mentioned, so I thought I would go to that place.

Q. Well, did you get into that box-car for the purpose of going to Tucson?

A. I didn't know where I was going.

Q. Well, why didn't you get out when you got to Tucson?

A. I didn't know where I was, I could not see from the car.

Q. Now, when did you leave Juarez, Mexico?

A. I don't know anything about that place.

Q. Now, when did you leave Mexico?

A. I don't know Mexico.

Q. Who is that man that conducted you to the car and put you and Poon Quan in?

A. Nobody; we went in there ourselves, just wandered in?

Q. When did you leave Deming, New Mexico?

A. I don't know Deming.

Q. When did you leave Lordsburg?

A. Never been to Lordsburg.

Q. Have you ever been in the state of Arizona?

A. No.

Q. Where do you want to go now?

A. I would like to go back to Sacramento.

Q. You just came down into this country, then, to look around and go back, did you?

A. No, I came to look for work; if I could make any money I would go back.

Q. How much money have you?

A. Two dollars.

Q. Are those your neck-ties? (Indicating several neck-ties.) A. Yes, sir.

Q. Where did you get this one (referring to neck-tie having the trade-mark "Pomeroy Bros., Sacramento")? A. Sacramento.

Q. Where did you get this blue neck-tie (indicating)?

A. I got that at the French restaurant when a man, a foreigner, was taking his meals; he did not want that tie and so gave it to me.

Q. That was in Sacramento? A. Yes, sir.

Q. How long ago? A. Oh, about five years ago.

Q. About five years ago, was it? A. Yes, sir.

Q. You think that accounts for the fact that the neck-tie has the trade-mark: "The Popular D.G.Co., El Paso, Texas"?

A. That I don't know, because that was given to me at Sacramento.

Q. Where did you get this silver watch (indicating watch)? A. Sacramento.

Q. Did you buy it new? A. Second-hand.

Q. How long ago?

A. About fifteen or sixteen years ago.

Q. Where were you living in K.S. 19 and 20?

A. Sacramento.

Q. Didn't you tell me a while ago that you were in Chico, California, from K.S. 19 to 21?

A. No, sir; it was K.S. 9th year.

Q. During the registration period for Chinese did you register and procure a certificate of residence?

A. Yes.

Q. Under what name did you register?

A. Ow Sam Goon.

Q. What was the number of your certificate?

A. I don't know.

Q. Where is that certificate now?

A. At Sacramento.

Q. In whose custody?

A. At the Hung Loong tailor-shop, Third Street.

Q. Who has charge of your certificate?

A. It is in the custody of Loui Gar Soon.

Q. What is Loui Gar Soon's business?

A. He operates that Hung Loong tailor-shop.

Q. You told me a while ago you didn't know who the boss man of that shop is.

A. He is now in China. I meant that the other man I don't know.

Q. Is Loui Gar Soon now in China?

A. Yes, sir.

Q. When did he go?

A. Chinese first month, last year (between January and February, 1914).

Q. Who went with him? A. I don't know.

Q. Were you there when he left Sacramento?

A. Yes, I hadn't gone yet.

Q. When you left Sacramento, Loui Gar Soon was still there, was he? A. Yes, sir.

Q. But you say you left Sacramento eight months ago? A. Yes.

Q. And he left there a year ago, How can that be?

A. It was about that time, but I don't know for sure.

Q. And while you were still in Sacramento, Loui Gar Soon left for China. Is that correct?

A. He had already returned to China before I left Sacramento.

Q. Did he take your certificate with him?

A. No, he has got it at his store.

Q. In whose custody did he leave it in the store?

A. I don't know, because he is the only one I know.

Q. Why did you leave your certificate of residence with this man? You said a while ago you didn't

know him very well.

A. I gave it to him to keep for me.

Q. Where did he keep it, do you know?

A. I don't know; for instance, if I give you a paper I would not know where you keep it.

Q. Did he have an iron safe in his tailor-shop?

A. That I don't know.

Q. About when did you give your certificate of residence into the custody of Loui Gar Soon?

A. About sixteen or seventeen months ago.

Q. Have you seen your paper since? A. No.

Q. And you know that Loui Gar Soon has since gone to China? A. Yes, sir.

Q. You went with him, didn't you?

A. If I had money to go back to China I would be in good fortune.

Q. If you were in Sacramento now, to whom would you apply for that certificate?

A. I would approach the store to find it

Q. Whom would you ask in that store for that paper? A. I would ask the man in charge.

Q. Who is he?

A. I don't know, because all I got to do is to ask for the manager and find out from him.

Q. Do you know any of the men that work in that tailor-shop? A. No.

Q. Have you any baggage left there in the tailor-shop or down in the basement where you used to have your room? A. No.

Q. Do you know any white men in Sacramento?

A. Yes.

Q. Whom do you know?

A. Mr. Four (phonetic) at the French restaurant.

Q. Is he connected with that restaurant?

A. He boards at that restaurant.

Q. How long has it been since you saw him?

A. Five years ago.

Q. Was he there when you left Sacramento eight months ago? A. I don't know.

Q. You haven't seen him for about five years?

A. Yes, that is right.

Q. Do you know any other white men in Sacramento?

A. Mr. Johnson; he is in the employ of the Government, working in the Capitol.

Q. Do you mean the Governor?

A. I know Governor Johnson.

Q. Does he know you well?

A. He has known me for a long time.

Q. When was the last time you saw Governor Johnson? A. Over a year ago.

Q. How much over a year?

A. It may be a year or more, and may be it is just about a year, I am not sure.

Q. Where did you see him the last time?

A. On Tenth Street in Sacramento; I met him walking.

Q. How does he happen to know you so well?

A. I have worked for him and also his father.

Q. In what capacity did you work for him?

A. Cook.

Q. Cook in his father's family? A. Yes, sir.

Q. Cook in his family?

A. I have also cooked for his father's family and his family.

Q. For how long did you cook in the Governor's family? A. About a year.

Q. When did you quit cooking for the Governor?

A. I cannot remember now, it is so long ago.

Q. About how many years ago?

A. About eight or ten years ago, but I cannot remember.

Q. Did you have any conversation with the Governor about a year ago?

A. He asked me, "How-do, Sam," and I said, "How-do, Mr. Johnson." That is all.

Q. Didn't you tell him you were on the point of going to China?

A. No, I have not been back to China; why should I say so to him. I didn't say anything like that because I have no money.

Q. What other white men do you know in Sacramento?

A. Mr. Cotron (phonetic), retailer wood and fuel on Second Street, I don't know what number.

Q. When was the last time you saw him?

A. Oh, about ten years ago.

Q. What white man now in Sacramento knows you?

A. George Lider (phonetic); he is a guide, he now hangs around Chinatown.

Q. When was the last time you saw him?

A. About nine months ago; I saw him a week or two before my departure.

Q. What other white men in Sacramento know you? A. That is all.

Q. Did you ever see a Chinese inspector in Sacramento?

A. I didn't know which was the inspector.

Q. Did you ever show your certificate of residence to an inspector? A. No, sir.

Q. Not since you received it? A. No, sir.

Q. What are you going to do about procuring your certificate of residence?

A. I would like to write to Governor Johnson and ask him to find it for me. The inspector took me off the car, but I don't know for what purpose.

Q. Why do you try to travel around the country without your certificate of residence?

A. They have never examined my certificate for all this while, and I thought it would not be necessary to take it.

Q. Have you ever been arrested?

A. No, sir; never been in jail at all.

Q. Have you ever been a witness for a Chinese person? A. No.

Q. Where did you get those shoes (indicating shoes which alien has on)? A. San Francisco.

Q. When? A. Two years ago.

Q. Why, in all the accounts of your travels, you haven't indicated that you have been in San Francisco since you first came to this country in 1874.

A. I didn't state San Francisco, because I have never worked there. I have made several visits there on pleasure.

Q. At the time you bought those shoes two years ago, how long did you stay in San Francisco?

Six days.

Q. From whom did you buy these shoes (indicating shoes which alien has on) ?

A. From a Chinese store.

Q. What store ?

A. The Lin Hing store at Sacramento Street.

Q. How do you account for the fact that these shoes have a Chinese trade-mark in them ?

A. Those shoes were made by Chinese.

Q. Where? A. San Francisco.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of investigation in this case.

ABRAM O. HADDEN,
Stenographer.

No. 53944/35.

February 27, 1915.

Immigration Service,
Tucson, Ariz.

Arrew Ow Sam Goon, zebu, erudite. Relay
twenty-five.

Assistant Secretary.

CEB.

Exact copy as signed by LOUIS F. POST.
Mailed 2-27 by L.

WARRANT—ARREST OF ALIEN.
UNITED STATES OF AMERICA.
U. S. DEPARTMENT OF LABOR.
Washington.

No. 53944/35.

To F. W. BERSHIRE, Supervising Inspector, El
Paso, Texas,

Or to any Immigrant Inspector in the service of
the United States.

WHEREAS from evidence submitted to me, appears that the alien Ow Sam Goon, who landed at an unknown port, on or about the 15th day of February, 1915, is subject to be taken into custody and returned to the company whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese exclusion laws, for the following among other reasons:

That he re-entered the United States in violation of section 7, Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and WHEREAS, from evidence submitted to me, it appears that the said alien has been found in the United States in violation of the act of February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:

That he entered in violation of section 36 of said act (rule 13).

I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show why he should not be deported in conformity with law.

The expense of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1915." Pending disposition of his case the alien may be released from custody upon furnishing satisfactory bond in the sum of \$2,500.

For so doing, this shall be your sufficient warrant.
Witness my hand and seal this 27th day of February, 1915.

Exact copy as signed by LOUIS F. POST.

Mailed 2/27 by L.

By _____,
Assistant Secretary of Labor.

CEB.

DEPARTMENT OF LABOR.

TELEGRAM.

2PO. Y.17 Paid G. R. Night.

944/35

Received, Bureau of Immigration, Feb. 27, 1915.

El Paso, Texas, February 26, 1915.

Immigration

Washington, D. C.

Wadding Ow Sam Goon Chinese male erudite zebu
relegate twenty five. Wire Tucson.

BERKSHIRE.

February 27, 1915, 914 am.

[Endorsed]: No. 15,802. U. S. District Court,
Northern District of California, First Division. In
the Matter of Owe Sam Goon, on Habeas Corpus.
Respts. Exhibit "A." Filed Apr. 17, 1915. W. B.
Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Case No. 2702. U. S. Circuit Court of Appeals for
the Ninth Circuit. Respondent's Exhibit "A."
Filed Dec. 9, 1915. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

SAMUEL W. BACKUS, Commissioner of Immigration,
tion,

Appellant,

vs.

OWE SAM GOON,

Appellee.

**Order Extending Time [to File Record and Docket
Case in Appellate Court].**

Good cause appearing therefore, and it appearing to this Court that further time is needed in which to provide for the return of the certified Immigration record from the Department of Justice at Washington, D. C., which said record was temporarily withdrawn from the files by order of the District Court;

IT IS HEREBY ORDERED that the appellant herein, Samuel W. Backus, may have to and including the 25th day of August, 1915, within which to file his record on appeal and docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 15, 1915.

WM. W. MORROW,
United States Circuit Judge for the Ninth Circuit.

[Endorsed]: No. 2702. U. S. Circuit Court of Appeals, Ninth Circuit. Samuel W. Backus, Commissioner of Immigration, vs. Owe Sam Goon. Order Extending Time in Which to File Record and Docket. Filed Jul. 15, 1915. F. D. Monckton, Clerk.

Refiled Dec. 9, 1915. F. D. Monckton, Clerk.

No. 2702

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL W. BACKUS, as Commissioner of
Immigration at the Port of San Francisco,
Appellant,

VS.

OWE SAM GOON,

Appellee.

BRIEF FOR APPELLANT.

JNO. W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Assistant United States Attorney,
Attorneys for Appellant.

Filed this.....*day of April, 1916.*

FRANK D. MONCKTON, Clerk.

By.....*, Deputy Clerk.*

Filed

APR 14 1916

F. D. Monckton

No. 2702

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL W. BACKUS, as Commissioner of
Immigration at the Port of San Francisco,
Appellant,

vs.

OWE SAM GOON,

Appellee.

BRIEF FOR APPELLANT.

FACTS.

There is no contention as to the following facts with respect to the appellee, Owe Sam Goon: that he is of the Chinese race, and a citizen of China; that he came to the United States before the enactment of the first Chinese exclusion law; that he has ever since been a laborer; that he was duly registered as a Chinese laborer under the Act of May 5, 1892, and that he would now be entitled to be and remain in the United States, provided he has not left the United States since his said registration.

The question to be determined upon this appeal is whether the certified record of the Bureau of Immigration, set forth in the transcript, pages 37 to 89 inclusive, shows that the Secretary of Labor acted

within the authority vested in him by law when he ordered this Chinese alien's deportation *upon the finding that the alien had resided for a time in Mexico, and had surreptitiously entered the United States from Mexico subsequent to July 1, 1914.*

From the said record of the Bureau of Immigration it appears that Owe Sam Goon and another Chinaman were taken from the vent of a refrigerator car on February 19, 1915, in the Southern Pacific Railroad yards at Tucson, Arizona. Upon being examined at length by a United States immigrant inspector on February 20, 1915 (Trans. p. 68-87) Owe Sam Goon accounted for himself and for his presence in the refrigerator car in brief as follows: That he had been employed for many years in Sacramento, California, and vicinity as a cook, and had never been out of the United States since his coming here in 1873 or 1874; that about eight months before his said examination he left Sacramento in search of employment, making his way southward through California to Tucson, Arizona; that he walked all the way from Madera, California, which place he left about four months before his said examination, until he climbed into the refrigerator car from which, after a ride of several hours, he was taken as aforesaid at Tucson. The Court is earnestly requested to read the statements made by Owe Sam Goon during the said examination in order that it may fully appreciate how preposterous was the story told by him of aimless wandering, on foot, for months, through half the length of the State of Cali-

fornia and through the forbidding wastes of Arizona—all with the simple object of finding work. The records of the Immigration Service abound with instances where Chinese, after having been smuggled across the border, were secreted in freight cars, and therein taken into the interior of the country. With such experiences before them, the absolutely unbelievable account given by Owe Sam Goon of his presence in the refrigerator car would alone have justified the immigration officials in coming to the conclusion that he had clandestinely crossed the border from Mexico.

However, before an application was made to the Secretary of Labor for a warrant for the arrest of the alien, a statement was taken at El Paso, Texas, on February 26, 1915, from one Pascual Carrion, manager of the water works department of the City of Juarez, Mexico, who also held a commission to oversee Chinese affairs in that city (Trans. p. 65-68). *Carrion was shown a photograph of Owe Sam Goon, which he immediately and positively identified as the photograph of a Chinaman he had seen many times in a laundry in Juarez, Mexico, up to August or September, 1914.* He further told of having shown the said photograph to police officers of Juarez, Mexico, and of their also stating that they had seen the person represented thereby in said Juarez. It should be stated that Carrion was not called upon to identify Owe Sam Goon in person as the Chinaman he had seen in the laundry in Juarez, nor was his statement made in the presence

of Owe Sam Goon. It is not questioned that the photograph shown Carrion is a good likeness of Owe Sam Goon, the appellee.

Based upon the aforesaid statements of Owe Sam Goon taken February 20, 1915, and of Pascual Carrion taken on February 26, 1915, an application was made to the Secretary of Labor on February 27, 1915, both by mail (Trans. p. 63, 64) and by telegraph (Trans. p. 89) for a warrant for the arrest of the alien. The warrant was accordingly issued by the Assistant Secretary of Labor on February 27, 1915 (Trans. p. 40-42), the part thereof material to this matter being as follows:

“WHEREAS, from evidence submitted to me, it appears that the alien, Owe Sam Goon, who landed at an unknown port, on or about the 15th day of February, 1915, is subject to be taken into custody and returned to the country from whence he came under Section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese exclusion laws, for the following among other reasons:

“That he re-entered the United States in violation of Section 7, Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, whereas, from evidence submitted to me, it appears that the said alien has been found in the United States in violation of the act of February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:

“That he entered in violation of Section 36 of said act (rule 13).

“I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.”

Pursuant to the directions contained in the warrant, the alien was brought before an immigrant inspector on March 1, 1915, for the purpose of granting him a hearing to enable him to show cause why he should not be deported in conformity with law (Trans. p. 50-58). At the hearing the warrant was presented, read and explained to the alien, who was further advised of the nature of the proceeding and the evidence (including the aforesaid statement made by Pascual Carrion on February 27, 1915) against him. He reiterated the material statements made by him in his aforesaid examination of February 20; stated that he was never in Juarez, Mexico, but that he could offer no evidence to support this statement; admitted that he had never secured a laborer's return certificate under the Chinese exclusion laws, and that he at no time within the last three years had made application for admission into the United States to any immigration officer at a port of entry for Chinese or aliens generally; and waived the right of counsel.

The record of the hearing was then forwarded to the Commissioner General of Immigration, Washington, D. C. (Trans. p. 47, 48), who, in a memorandum reviewing the case for the Assistant Secre-

tary (Trans. p. 45, 46) expressed the opinion that the charges contained in the warrant of arrest had been substantiated, and recommended the alien's deportation to China, which recommendation was approved by the Assistant Secretary (Trans. p. 46). Thereupon the warrant of deportation, dated March 9, 1915 (Trans. p. 43-45) was issued, and the alien delivered thereunder to the appellant for deportation, when this habeas corpus proceeding was instituted before the District Court.

The material part of the warrant of deportation is as follows:

“WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Ariz., I have become satisfied that the alien, Owe Sam Goon, who landed at an unknown port, subsequent to the 1st day of July, 1914, is subject to be returned to the country whence he came under Section 21 of the Immigration Act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese exclusion laws, in that:

“He re-entered the United States in violation of Section 7, Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Ariz., I have become satisfied that the said alien has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, in that:

“He entered in violation of Section 36 of said Act (rule 13).”

Particular attention is called to the fact that the warrant of deportation contains two separate and distinct findings: (1) *that the alien re-entered the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and (2) that he entered the United States in violation of Section 36 of the Immigration Act of February 20, 1907, amended by the Act of March 26, 1910.* It will be noted that the warrant of arrest charged the same violation of each law, and that the alien was given a full opportunity to meet each charge.

THE LAW.

Section 21 of the said Immigration Act is in part as follows:

“That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by Section 20 of this Act.”

The authority of the Secretary of Labor under this section to order the deportation, within three years after entry, of Chinese found to be in the

United States in violation of the Chinese exclusion laws is recognized by the Court below (Trans. p. 9) and has been repeatedly recognized by the other Courts.

Sibray vs. United States (C. C. A. 3rd Circ.), 227 F. 1;

Jeung Bow vs. United States (C. C. A. 2nd Circ.), 228 F. 868;

United States vs. Sisson (D. C.), 222 F. 693;

Ex parte Lee Ying (D. C.), 225 F. 335;

Ex parte Woo Shing (D. C.), 226 F. 141;

Ex parte Chin Him (D. C.), 227 F. 131;

Ex parte Wong Yee Toon (D. C.), 227 F. 247.

Section 7 of the Chinese exclusion act of September 13, 1888, provides that a Chinese laborer claiming the right to be permitted to leave the United States and return thereto must, before his departure from the United States, apply to the proper immigration official for a return certificate, which will be issued to him before departure upon the submission of satisfactory evidence that he has a lawful wife, child, or parent in the United States, or property therein of the value of \$1000, or debts of like amount due him and pending settlement. The section goes on to state that this return certificate "shall be the sole evidence given to such person of his right to return," and that "no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required." In

United States vs. Tuck Lee, 120 Fed. 989, it was held that where a Chinese laborer departs and returns without such certificate he is subject to deportation; and in *Hom Yuen vs. United States*, 214 Fed. 57, that his certificate of residence is thereby abrogated.

Section 36 of the Immigration Act is as follows:

“That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by Sections 20 and 21 of this Act: *Provided*, that nothing contained in this section shall affect the power conferred by Section 32 of this Act upon the Commissioner General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico.”

In *United States vs. Wong You*, 223 U. S. 67, it was settled that a Chinese, like any other alien, who enters the United States surreptitiously, may be deported under a warrant issued by the Secretary of Labor as being in the country in violation of Section 36 of the immigration laws, irrespective of the fact that he might also be subject to expulsion under the Chinese exclusion acts.

Immigration Rule 13, referred to in above warrants, is, so far as it is necessary to quote it for the purposes of this case, as follows:

“INSPECTION ON MEXICAN BORDER.

“Subdivision 1. PORTS OF ENTRY. Under

Section 36 the following are named as Mexican border ports of entry for aliens: Brownsville, Hidalgo, Laredo, Eagle Pass, Del Rio and El Paso, Tex.; Douglas, Naco and Nogales, Ariz.; and Andrade, Campo, Calexico and Tia Juana, Cal.

“Subd. 2. PROCEDURE. Aliens applying for admission at the Mexican border ports of entry are subject to examination in the same manner and to the same extent as though arriving at seaports, report of inspection to be made on the appropriate form.”

ARGUMENT.

The opinion of the Court below was expressed upon the overruling of the demurrer and the ordering of the writ of habeas corpus to issue (Trans. p. 9-11). Although a return to the petition was afterwards filed by the appellant (Trans. p. 13-16) and a traverse to the return by the appellee (Trans. p. 17-22), the Court in discharging the petitioner (Trans. p. 23) expressed no further views upon the case.

From the said opinion (Trans. p. 9-11) it will readily be seen that the Court considered only the legality of the Assistant Secretary's finding in the warrant of deportation that the alien was in the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, and either overlooked or ignored the other finding contained in the warrant, to-wit, that the alien was in the United States in violation of Section 36 of the Immigration Act of February 20, 1907, amended by

the Act of March 26, 1910, which latter finding was in itself—if the hearing was not manifestly unfair, or there was not a manifest abuse of discretion on the part of the executive officers (*Low Wah Suey vs. Backus*, 225 U. S. 468)—fully sufficient under the law to support the order of deportation. *U. S. vs. Wong You*, 223 U. S. 67 *supra*. Consequently, as the said opinion shows, the Court confined its ruling strictly to the question, whether, in passing upon the legality of the alien's residence in this country under a Chinese exclusion act, the Assistant Secretary could base his adverse decision upon evidence that would not have been admissible had the proceeding been before a United States Commissioner or Judge. It will be observed that the Court substantially admits that, had the Assistant Secretary found upon the same evidence that the alien was in the country in violation of a provision of the Immigration Act, the Court would be without power to set aside the finding of the Assistant Secretary. Inasmuch as the Assistant Secretary *did* find that the alien was here in violation of a provision of the immigration law, to-wit, Section 36, it is submitted that the Court below should be reversed.

Assuming, merely for the purpose of discussing the District Court's opinion, that the Court disposed of the whole matter before it by passing upon the validity of the Assistant Secretary's finding that the alien was in the United States in violation of a Chinese exclusion law, the appellant maintains that the Court erred in holding, first, that the testimony

of the witness Pascual Carrion, in which he identified a photograph of the alien as representing a Chinaman he had seen in Mexico, was the only evidence upon which the Assistant Secretary's order of deportation was based, and, second, that the said testimony of Carrion was evidence of such a character that the Assistant Secretary could not lawfully consider it in determining that the alien had been in Mexico.

With respect to the first holding, the Court evidently overlooked the fact that the circumstances under which the alien was apprehended, and his utter inability to explain those circumstances with any degree of plausibility, when coupled with the knowledge that the Department of Labor had that many Chinese who have been smuggled over the border from Mexico have been concealed in freight cars for the purpose of getting them to interior points, might well have satisfied the Assistant Secretary that the alien had come from Mexico. The Court states that Owe Sam Goon was not found near the Mexican border. He was found at Tucson, Arizona, which, while not on the border, is still in what may be termed the border zone, and is a place through which trains bound for the interior pass in going from points nearer the border than Tucson. The alien himself admits that he had ridden for several hours in the refrigerator car from which he was taken. His inability to tell where he entered the car, or where he was when taken therefrom, strongly indicates that he had not reached his des-

tinuation, but intended to stay in the car until he did. If he were not a smuggled Chinaman, why was he unable to tell a story with at least a suggestion of the stamp of truth upon it?

The ruling that the testimony of Pascual Carrion was improperly considered as evidence in determining the alien's status, presents a question that is very important to the officials of the Department of Labor whose duty it is to enforce the Chinese exclusion laws.

In providing that when "the Secretary of Labor shall be *satisfied* that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act, or of any law of the United States (in the present case the Chinese exclusion law of September 13, 1888), he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came * * *," Congress in no way intimated that in a case coming under the provisions of a Chinese exclusion law the Secretary must be satisfied by evidence admissible in a Court of law, although in a case coming under the Immigration Act the Secretary may be satisfied from evidence not admissible in a court of law. There is no intimation that the summary proceeding, recognized in all authoritative decisions of the Courts, to have been contemplated in cases coming under provisions of the immigration law, should be in any

respect restricted in cases coming under the provisions of the Chinese exclusion laws. The only conceivable purpose of Congress in thus giving the Secretary of Labor concurrent jurisdiction with United States Commissioners and Judges in the expulsion of Chinese who are here unlawfully must have been to provide a more summary and effective means of expelling them. The calendars of the Courts were not crowded with such cases, and surely Congress could not have considered that the Secretary of Labor, who is not required to have the qualifications of a jurist, or even a lawyer, could pass upon Chinese cases more in conformity with the rules of evidence than United States Commissioners or Judges. Furthermore, Congress must have considered that the inspectors who were to conduct the departmental hearings were not required under the rules governing their appointment to possess any knowledge whatsoever of the rules of evidence.

Although in *United States vs. Wong You*, 223 U. S. 67 *supra*, the question decided was whether a Chinese could be expelled under a warrant issued by the Secretary of Labor on the ground that he entered the United States in violation of Section 36 of the Immigration Act, and the question here being discussed is whether a Chinese can be expelled under a warrant of deportation issued by the Secretary of Labor on the ground that he is in the country in violation of a provision of the Chinese exclusion law, the question whether Congress intended by the Immigration Act to subject Chinese, like other

aliens, to summary departmental proceedings, the holding of the Court in favor of the jurisdiction of the Secretary of Labor in cases relating to Chinese, is as applicable to the case at bar as it is to that case.

“By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the Government to limit the entrance of the Chinese. It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms.”

In *Lee Lung vs. Patterson*, 186 U. S. 168, the Supreme Court said:

“ * * * we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to the evidence, or by rejecting proper evidence, or by *admitting that which is improper.*” (Italics volunteered.)

This general principle is fully applicable to the present case inasmuch as it may be considered settled from the following cases cited *supra* that Section 21 of the Immigration Act gives the Secretary of Labor power to expel Chinese in the United States in violation of the Chinese exclusion laws.

Sibray vs. United States (C. C. A. 3rd Circ.),
227 F. 1;

Jeung Bow vs. United States (C. C. A. 2nd Circ.), 228 F. 868;
United States vs. Sisson (D. C.), 222 F. 693;
Ex parte Lee Ying (D. C.), 225 F. 335;
Ex parte Woo Shing (D. C.), 226 F. 141;
Ex parte Chin Him (D. C.), 227 F. 131;
Ex parte Wong Yee Toon (D. C.), 227 F. 247.

From the reported decisions it does not appear that this question of evidence has ever been directly raised in any other case. There are cases, however, in which the Courts have without question recognized the principle herein contended for in behalf of the appellant.

Sibray vs. United States (C. C. A. 3rd Circ.), 227 F. 1;
Jeung Bow vs. United States (C. C. A. 2nd Circ.), 228 F. 868;
Ex parte Chin Him (D. C.), 227 F. 131;
Ex parte Wong Yee Toon (D. C.), 227 F. 247.

In *Sibray vs. United States supra*, the Secretary of Labor, under the authority of Section 21 of the Immigration Acts, had ordered a Chinese deported on the sole ground that he had entered the United States in violation of Section 6 of the Chinese exclusion act of May 5, 1892. The Court said:

“It is true the proceeding was not conducted in all respects as if a trial in Court had been in progress, but this was not necessary; the Act of 1907 contemplates a summary investigation and not a judicial trial, and while an alien’s

right to be heard must be respected and the discretion of the officials must not be abused, the formalities of procedure and rules governing the admissibility of evidence have been much relaxed. *U. S. vs. Uhl* (C. C. A. 2nd Circ.), 215 F. 573; *Choy Gun vs. Backus* (C. C. A. 9th Circ.), 223 F. 492.”

Farther on, in the same decision, the Court said :

“The Act does not provide for process to compel the appearance of witnesses (*Low Wah Suey vs. Backus*, 225 U. S. 460), and both parties were therefore obliged to rely on their attendance without compulsion.”

Had a judicial proceeding been invoked the appearance of witnesses could have been compelled by process, and the Court did not question that Congress intended by Section 21 of the Immigration Act to deprive Chinese of this valuable right which they had always had when the judicial branch of the Government had sole jurisdiction.

In *Jeung Bow vs. United States supra*, as in the case at bar, the Secretary of Labor ordered a Chinese deported under the authority of Section 21 of the Immigration Act, both upon the ground that he was in the United States in violation of a Chinese exclusion law (he having surreptitiously crossed the border from Canada), and in violation of the immigration law (he being liable to become a public charge). The Court, with reference to the objection made that the alien was not represented at the hearing by counsel, said, without differentiating between the two laws invoked :

“The proceeding under review is not a criminal prosecution, but an administrative hearing before the immigration authorities, and it need not be conducted in accordance with the procedure and rules of evidence which are observed in the courts of law.”

In *Wong Yee Toon supra*, which was also a case in which the Secretary of Labor issued a warrant for the deportation of a Chinese on the ground that he was in the United States in violation of a Chinese exclusion law, the Court said:

“One of the essentials of such a hearing is that there shall be some evidence to sustain the charge which is being heard, although in hearings before administrative officials, they may doubtless accept testimony that would not be admissible in a court of law * * *.”

Respectfully submitted,

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